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IN THE

Supreme Court of the United States

PATRICIA BRAGG, *et al.*,
Petitioners,

v.

WEST VIRGINIA COAL ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

Petitioners, aggrieved by mountaintop removal coal mining in West Virginia, brought this citizen suit for prospective declaratory and injunctive relief against a state official under § 520(a)(2) of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1270(a)(2), for violating his nondiscretionary duties under both § 510 of SMCRA, *id.* § 1260, and under West Virginia's federally-approved state regulatory program, which is codified in the Code of Federal Regulations. Federal government officials were also parties below and argued that federally-approved state programs are enforceable as federal law, consistent with the long-standing position of the U.S. Department of the Interior.

The Fourth Circuit held that, once a state program is federally approved, it operates solely under state law, and federal regulatory authority under SMCRA "drops out." As a result, the Fourth Circuit dismissed Petitioners' suit, holding that the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), did not apply because that exception to a state's Eleventh Amendment immunity only applies to violations of federal, not state, law. The question presented is:

Under SMCRA and the doctrine of *Ex parte Young*, may a private plaintiff seek prospective injunctive and declaratory relief against a state official in federal court to enforce compliance with either § 510 of SMCRA, which requires the state to adhere to its federally-approved state program, or with a provision of such a state program, which is codified in the Code of Federal Regulations?

Parties to the Proceeding

1. Petitioners are Patricia Bragg, James W. Weekley, Sibby R. Weekley, Cheryl Price, Jerry Methena, and the West Virginia Highlands Conservancy. Petitioners were plaintiffs in the district court and appellees in the court of appeals.

Pursuant to Rule 29.6, the West Virginia Highlands Conservancy states that it has no parent corporations or subsidiaries.

Tommy Moore, Victoria Moore, Harry M. Hatfield, and Marcia Hatfield were dismissed as plaintiffs in the district court and are not petitioners in this Court. Carlos Gore, and Linda Gore were plaintiffs below and are not petitioners in this Court.

The Kentucky Resources Council and Friends of the Earth appeared as *amici curiae* in support of petitioners in the court of appeals.

2. Federal respondents are Colonel John Rivenburgh, District Engineer, U.S. Army Corps of Engineers, Huntington District; Lieutenant General Robert B. Flowers, Chief of Engineers and Commander of the U.S. Army Corps of Engineers; and Michael D. Gheen, Chief to the Regulatory Branch, Operations and Readiness Division, U.S. Army Corps of Engineers. In the district court, Colonel Rivenburgh's predecessor, Colonel Dana Robertson, and Lieutenant General Flowers' predecessor, Lieutenant General Joe M. Ballard, were defendants. Federal respondents were defendants in the district court and appellants in the court of appeals.

The state respondent is Michael Callaghan, Secretary, West Virginia Department of Environmental Protection. Secretary Callaghan and his predecessors, Michael Miano and Michael C. Castle, were defendants in the district court and appellants in the court of appeals in all appeals except Nos. 00-1338 and 00-1339, where they were appellees. These two appeals related to the validity of a consent decree between petitioners and the

state respondent.

Additional respondents are the West Virginia Coal Association, West Virginia Mining and Reclamation Association, Hobet Mining, Incorporated, Catenary Coal Company, Mingo-Logan Coal Company, Western Pocahontas Properties Limited Partnership, National Council of Coal Lessors, Incorporated, and International Union, United Mine Workers of America. These parties were intervenor-defendants in the district court and appellants in the court of appeals.

The National Mining Association, AEI Resources, Inc., Washington Legal Foundation, Allied Educational Foundation, Interstate Mining Compact Commission, and Commonwealth of Virginia appeared as *amici curiae* in support of appellants in the court of appeals.

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Petition for a Writ of Certiorari

Petitioners Patricia Bragg, James W. Weekley, Sibby R. Weekley, Cheryl Price, Jerry Methena, and the West Virginia Highlands Conservancy (Bragg) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Opinions Below

The opinion of the court of appeals (App. A, 1a-29a) dismissing Counts 2 and 3 of Bragg's complaint is reported at 248 F.3d 275. The opinion of the district court denying the state respondent's motion to dismiss those and other Counts for lack of subject matter jurisdiction (App. B, 30a-47a) is unreported. The opinion of the district court granting Bragg's motion for summary judgment and a permanent injunction on Counts 2 and 3 (App. C, 48a-89a) is reported at 72 F. Supp.2d 642. The opinion of the district court granting a stay of that injunction pending appeal (App. D, 90a-93a) is reported at 190 F.R.D. 194.

The district court also issued several opinions on other claims that are not the subject of this petition. The opinion granting Bragg's motion for a preliminary injunction against the federal and state Respondents on Counts 2, 3, 6, 8, 9, 14, and 15 is reported at 54 F. Supp.2d 635, granting Bragg's motion to dismiss Counts 1, 11, 12 and 13 based on a settlement agreement with the federal Respondents is reported at 54 F. Supp.2d 653, and granting a joint motion of Bragg and the state Respondent to enter a Consent Decree on Counts 4 through 10, 14, and 15 is reported at 83 F. Supp.2d 713.

Jurisdiction

The judgment of the court of appeals was entered on April 24, 2001. The court of appeals denied timely petitions for

rehearing and rehearing en banc on July 13, 2001. App. E, 94a-95a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the Constitution of the United States, and relevant sections of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. §§ 1201, *et seq.*, federal implementing regulations under SMCRA, and West Virginia's federally-approved state program under SMCRA are reprinted at App. F, 96a-111a.

Statement

1. Mountaintop Removal Mining and This Lawsuit. This case concerns the environmental protections under SMCRA for "valley fills" created by mountaintop removal (MTR) mining. In MTR mining, entire mountains are blasted away to recover coal, and the waste dirt and rock ("excess spoil") not returned to the mountain is often dumped into adjacent valleys and streams. A single valley fill may be over 1,000 feet wide, hundreds of feet deep, and several miles long. Hundreds of miles of West Virginia streams have been buried by valley fills and thousands of acres of forested valleys have been leveled. The U.S. Fish and Wildlife Service has found that "the loss of these streams and their associated forests may have ecosystem-wide implications."

Petitioners, who live and recreate near these mines, brought this suit for prospective declaratory and injunctive relief against a West Virginia state official under SMCRA and against federal officials under the Clean Water Act and National Environmental Policy Act. The claims against the federal officials were settled. Petitioners allege that the state official violated his nondiscretionary duty to comply with both § 510 of

SMCRA, 30 U.S.C. § 1260, and with a federally-approved state rule under SMCRA that prohibits the destruction of intermittent and perennial streams. The district court ruled that (1) the state rule, approved by the federal government pursuant to SMCRA, was federally enforceable, (2) Petitioners' suit fell within the *Ex parte Young* exception to Eleventh Amendment immunity, and (3) the state official had systematic-ally violated both § 510 and the state rule's mandatory require-ments. On appeal, the federal defendants agreed with the district court's decision as to jurisdiction and liability. However, the court of appeals reversed on jurisdictional grounds without reaching the merits, holding that the state rule was purely state law and that, under *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), the Eleventh Amendment barred citizens from enforcing § 510 and any portion of a federally-approved state program under SMCRA in federal court against a state official.

2. Statutory Background. Congress enacted SMCRA in 1977 to establish minimum national standards to govern coal mining operations. 30 U.S.C. § 1202. SMCRA is administered through the U.S. Department of the Interior by the Office of Surface Mining Reclamation and Enforcement (OSM). *Id.* § 1211. To achieve its goals, SMCRA relies on "a program of cooperative federalism that allows States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Virginia Surface Min. & Reclam. Ass'n*, 452 U.S. 264, 289 (1981). Any state "wishing to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations" on non-federal lands within its borders may submit a proposed state program to OSM for approval. *Id.* § 1253(a) (App. 96a).

A State that submits a State program to OSM for approval must "demonstrate[] that such State has the capability of carrying out the provisions of this Act . . ." *Id.* To do this, the

state must enact a law that regulates surface coal mining "in accordance with the requirements of this Act," id., § 1253(a)(1) and (a)(3), and must establish a permit system "meeting the requirements of this title," *id.*, § 1253(a)(4) (App. 97a). Once the state agency's program is federally approved, the agency becomes the "State regulatory authority," which is defined as "the department or agency in each State which has primary responsibility at the State level *for administering this Act.*" *Id.*, § 1291(26) (emphasis added) (App. 105a). The "regulatory authority" is further defined to mean "the State regulatory authority where the State is *administering the Act under an approved state program* or the Secretary where the Secretary is administering this Act under a Federal program . . ." *Id.*, § 1291(22) (emphasis added) (App. 105a).

Section 506(a) of SMCRA provides that no person shall engage in any surface coal mining operations without obtaining a permit issued by a state with an approved program or by OSM pursuant to a federal program. 30 U.S.C. § 1256(a) (App. 98a). In turn, § 510(b)(1) provides:

> No permit . . . shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing . . . that—
>
> (1) the permit application is accurate and complete and that *all the requirements of this Act and the State or Federal program have been complied with.*

Id., § 1260(b) (App. 99a) (emphasis added). Thus, this federal statute requires a state to adhere to SMCRA and its approved state program. An OSM regulation confirms this federal duty: "[s]tates with an approved program shall implement, administer, enforce and maintain it in accordance with the Act, this chapter, and *the provisions of the approved state program.*" 30 C.F.R. § 733.11 (App. 106a) (emphasis added). If a state

does not adhere to SMCRA and its program when it issues a mining permit, then that *federal statutory* duty to adhere to the state program is violated.

Since its first substantive rulemaking under SMCRA twenty-two years ago, OSM has consistently construed the provisions of approved State programs as federal law enforceable in federal court. With specific reference to the SMCRA citizen suit provision at issue here, OSM stated that:

> . . . the Act's *State programs*, while adopted in the first instances by the States, will also *become Federal law* when approved by the Secretary of Interior, being approved as Federal regulations and *enforceable as such in the United States courts*. Section 520(a) SMCRA; 30 U.S.C. Section 1270(a).

44 Fed. Reg. 14902, 15023 (Mar. 13, 1979) (emphasis added). OSM reiterated this interpretation nine years later:

> Before the Secretary may approve a state program, the state program must be consistent with, and cover the same ground as, the federal Act and regulations. *While adopted in the first instance by a state, a state program becomes Federal law when approved by the Secretary and promulgated as Federal regulation.* (44 FR 15023, March 13, 1979.) The State program must be "no less stringent than, meet the minimum requirements of, and include all applicable provisions of the Act" and be "no less effective than the Secretary's regulations in meeting the requirements of the Act." 30 CFR 730.5 and 732.15(a). *Federal standards imposed by the Act are thus enforced through the state program.*

53 Fed. Reg. 26728, 26737 (July 14, 1988) (emphasis added).

In section 520 of SMCRA, Congress authorized citizens to

bring civil actions to enforce SMCRA's requirements. *See* 30 U.S.C. § 1270 (App. 99a). In particular, Congress authorized citizens to sue State regulatory authorities in federal court "to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the . . . State regulatory authority to perform any act or duty under this Act which is not discretionary with the . . . State regulatory authority." *Id.*, § 1270(a)(2) (App. 100a). Congress "believe[d] that citizen suits can play an important role in assuring that regulatory agencies and surface operators comply with the requirements of the Act and federally-approved regulatory programs." S. Rep. No. 128, 95th Cong., 1st Sess. 88 (1977).

3. West Virginia's Federally-Approved State Program. On January 21, 1981, OSM approved the West Virginia Surface Coal Mining and Reclamation Act, 30 C.F.R. § 948.10, giving West Virginia jurisdiction to regulate surface coal mining within its borders. The West Virginia Division of Environmental Protection (DEP) is the state regulatory authority that administers the West Virginia state program.

Congress authorized OSM to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of" SMCRA. 30 U.S.C. § 1211(c)(2). Pursuant to this authority, OSM adopted a rule providing that "[t]he program applicable within each State is *codified* in the part for that State." 30 C.F.R. § 900.11 (emphasis added) (App. 108a). OSM codified West Virginia's entire federally-approved program in the Code of Federal Regulations. *Id.* Part 948. That part fills over a dozen pages and "contains all rules applicable only within West Virginia that have been adopted under [SMCRA]." *Id.* § 948.1 (App. 109a).

The West Virginia state program includes a so-called "buffer zone rule." At the time this case was decided, that rule provided that:

> No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that the surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

38 C.S.R. § 2-5.2 (App. 111a).[1] OSM approved this rule in 1990 and 1996, and specifically referenced it, by chapter and section number, in the Code of Federal Regulations. 30 C.F.R. §§ 900.12, 948.15 (App. 109a-110a).

4. Proceedings Below. Petitioners Patricia Bragg, seven other coalfield residents who live near MTR mines and valley fills, and a statewide environmental organization (collectively referred to hereafter as "Bragg"), filed a citizen suit under § 520(a)(2) against the Director of DEP in his official capacity, seeking prospective declaratory and injunctive relief. Bragg alleged that the Director of DEP was violating his nondiscretionary duties under SMCRA in issuing permits for

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[1]This rule was modeled on the federal buffer zone rule, 30 C.F.R. § 816.57, which in turn is based on SMCRA provisions that require mine operators to "minimize the disturbances to the prevailing hydrologic balance at the mine-site," and to "minimize disturbances and adverse impacts of operations on fish, wildlife, and related environmental values . . ." 30 U.S.C. §§ 1265(b)(10), (b)(24). After this case was decided, DEP amended the state buffer zone rule so that it is now identical to the federal buffer zone rule. This rule change does not affect the decision in this case.

MTR mines.

Before granting Bragg's motion for a preliminary injunction against a MTR mine, the district judge flew over southern West Virginia MTR sites in a helicopter. His flyover "revealed the extent and permanence of environmental degradation" that MTR mining produces:

> [M]ined sites were visible from miles away. The sites stood out among the natural wooded ridges as huge white [snow-covered] plateaus, and the valley fills appeared as massive, artificially landscaped stair steps. Some mine sites were twenty years old, yet tree growth was stunted or non-existent. Compared to the thick hardwoods of surrounding undisturbed hills, the mine sites appeared stark and barren and enormously different from the original topography.

54 F. Supp.2d 635, 646 (S.D.W.Va. 1999. The residents who live close to these huge mines experience noise, dust, and blasting vibrations that crack the walls and foundations of their homes. Generations-old communities near the mines are decimated by the exodus of neighbors and friends who are forced to move away to escape these conditions.

Counts 2 and 3 of Bragg's Complaint contain the claims relevant to this Petition, and focus on valley fills and the streams that they bury. Both counts seek to enforce the Director's nondiscretionary permitting duties related to the state "buffer zone rule." Count 2 alleges that the Director of DEP engaged in a pattern and practice of approving buffer zone variances without making the findings required by the buffer zone rule. Count 3 alleges that, because valley fills inherently have an adverse effect upon stream ecology and cause violations of water quality standards, the findings required by the buffer zone rule could never be made for valley fills that bury substantial portions of intermittent and perennial streams.

Both of these Counts seek to enforce the Director's nondiscretionary duty under § 510(b) of SMCRA, 30 U.S.C. § 1260(b), to reject permit applications that do not demonstrate compliance with its state program generally and the buffer zone rule particularly.

The Director of DEP moved to dismiss, asserting that Bragg's claims were barred by the Eleventh Amendment and that the court lacked subject matter jurisdiction. He argued that, although only injunctive relief and declaratory judgments against him in his official capacity were sought, the *Ex parte Young* exception to Eleventh Amendment immunity did not apply because that exception only applies to violations of federal law, and Bragg's claims arose under state law. The district court disagreed and held that *Ex parte Young* permitted Bragg's suit to proceed against the Director. App. 32a-37a, 55a-57a.

All but Counts 2 and 3 of the complaint were settled. The district court then granted Bragg's motions for summary judgment on those two remaining Counts. On Count 2, the district court held that the Director has a nondiscretionary duty under § 510(b) to withhold approval of mining permits until he certifies that all requirements of SMCRA and the state program have been complied with. App. 82a. The district court also held that the Director was violating his nondiscretionary duty under both this statute and the state buffer zone rule by admittedly not making six of the seven findings required by that rule. App. 83a. The "Director's legal rationales for failure to make the required buffer zone findings were inconsistent *with the controlling statute* and regulations." *Id.* (emphasis added).

On Count 3, the district court held that the Director has a nondiscretionary duty under the buffer zone rule to deny permits for valley fills in intermittent and perennial streams, because those fills have an "adverse effect" on stream flow, fish migration, water quality, and other environmental values. App.

87a. The district court observed:

> When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality.

App. 84a. For relief, the district court granted Bragg's motion for a permanent injunction, "enjoining the Director from further violations of the nondiscretionary duties discussed above and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal." App. 87a. The district court explained that this injunction was purely prospective, and applied only to future permit approvals. The district court stayed its injunction, however, pending appeal. App. 90a-93a.

The Director of DEP, the United States (on behalf of OSM, the U.S. Environmental Protection Agency (EPA), and the U.S. Army Corps of Engineers), and the Intervenor-coal companies and associations appealed the judgment on Counts 2 and 3. In its appellate brief, the United States supported the district court's decision on both jurisdictional grounds and the merits, and instead argued only that the scope of the injunction was overbroad. On the jurisdictional issue, the United States agreed with the district court and stated that "[t]he text of SMCRA makes clear that approved state programs for administering SMCRA establish standards enforceable as *federal* law," and

that "the violation of state regulations adopted pursuant to SMCRA and state-issued SMCRA permits constitutes the violation of *federal* law, enforceable through SMCRA's citizen suit provision." U.S. Br. 35 (emphases in original). The United States also stated that the phrase "exclusive jurisdiction" in § 503(a) "establishes only that approved state agencies have 'exclusive jurisdiction' within their states to regulate mining pursuant to SMCRA and subject to federal oversight" and "does not alter the fact that approved state programs implement *federal* law." U.S. Reply Br. 8-9 (emphasis in original). In contrast to the United States' position, the Director of DEP and Intervenors attacked the district court's decision on both Eleventh Amendment grounds and the merits.

The court of appeals reversed and remanded "with instructions to dismiss Bragg's unsettled claims asserted in Counts 2 and 3 without prejudice to any suit she may wish to pursue in West Virginia State court." App. 29a. The court held that, under SMCRA, federal and state regulatory authority are "mutually exclusive," and that once a State has received federal approval of its state program, state law becomes the "sole operative law," and federal regulatory authority "drop[s] out." App. 20a-21a. The court's opinion contains broad language defining the federal-state relationship under SMCRA. According to the Fourth Circuit, in states with approved programs, the federal government is "conditionally divest[ed] . . . of *direct* regulatory authority" and "we can look only to State law on matters involving enforcement of the minimum national standards." App. 19a (emphasis in original). The court further stated that although not "*all* of SMCRA's provisions 'drop out,'" the ones that remain are the "structural provisions creating the facility through which the State can attain and can lose its primacy status . . ." App. 21a (emphasis in original).

In reaching this conclusion, the court did not mention the United States' contrary interpretation of SMCRA. The court

also failed to reconcile its holding with its decision four years earlier in *Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231 (4th Cir. 1997). In that decision, the Fourth Circuit considered the United States' identical position that approved state programs are enforceable as federal law, and held that the "interpretation espoused by the Secretary is a permissible construction" and must be sustained. *Id.* at 236. It therefore accepted federal jurisdiction over a citizen suit against a mine operator to enforce a provision of Virginia's federally-approved state program under SMCRA. *Id.* at 236-37. In the instant case, the Fourth Circuit implicitly rejected *Molinary's* fundamental premise, but then cited *Molinary* without explanation for the vague proposition that "[i]t is now settled that 30 U.S.C. § 1270 confers on federal district courts subject matter jurisdiction *over at least some sorts of claims*." App. 27a (emphasis added). See *West Virginia Highlands Conservancy v. Norton*, 147 F. Supp.2d 474, 481 n. 9 (S.D.W.Va. 2001) ("This Court is unable to reconcile . . . *Molinary* . . . with our Court of Appeals' account of SMCRA cooperative federalism" in *Bragg*).

After concluding as a matter of statutory construction that approved state programs arise solely under state law, the court of appeals analyzed § 510 of SMCRA, which provided a separate basis for the district court's injunction. The court of appeals recognized that "Bragg's complaint essentially challenges the Director's failure to follow the permitting requirements set forth in" § 510. App. 21a. But the court of appeals transformed this violation of a federal statute into a violation of only state law:

> Because [§ 510] establishes minimum standards that have been adopted by West Virginia and approved by the Secretary, *see* W.Va.Code § 22-3-18, any violation of this standard involves State law, not federal law, even though the relevant language in the State law is identical to that in the

> federal law. Accordingly, any injunction against State officials to enforce this provision would command them to comport with the State's own law, not federal law, because only the State law is operative and directly regulates the issuance of permits.

App. 21a-22a (footnote omitted). In a footnote, the court of appeals also noted that the state counterpart to § 510 had been approved by OSM as a part of the West Virginia program. *Id.*

The court of appeals then balanced federal and state interests to determine whether this claim fell outside the bounds of the *Ex parte Young* exception. App. 16a-17a. While recognizing that "the federal interest in adjudicating the dispute is undoubtedly stronger" than that in *Pennhurst*, the court concluded that "the injunctive relief sought against the State Director in this case 'falls on the Eleventh Amendment side of the line' by some distance." App. 22a-23a. The court of appeals also relied on the 2-vote minority opinion in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997), to hold that because West Virginia's "law specifically provides for its own enforcement in a State forum, the concerns that gave rise to the exception of *Ex parte Young* evaporate." App. 25a.

Bragg and federal Respondents sought rehearing and rehearing en banc. Both petitions cited the direct conflict with *Molinary*. In its petition, the United States stated that the court's "fundamental premise that an approved State program is 'exclusively' state law for purposes of SMCRA's citizen suit provision is incorrect as a matter of law." U.S. Petition 8. The United States also stated that the court's decision "overlooks important aspects of the SMCRA regulatory scheme under which the Secretary of the Interior has substantial enforcement responsibility in primacy states." *Id.* at 11. The court of appeals denied both petitions.

Reasons for Granting the Petition

The Fourth Circuit erroneously held that a West Virginia state official has Eleventh Amendment immunity from citizen suits under federal law on the theory that West Virginia's duties under its federally-approved state program arise exclusively under state law. First, regardless of whether an approved state program is federal or state law, the court of appeals' decision conflicts with *Ex parte Young* by rejecting federal court jurisdiction to enjoin a violation of § 510 of SMCRA. That provision requires states to adhere to their state programs. The decision also conflicts with *Coeur d'Alene* by relying on the availability of a state court remedy to defeat prospective relief under *Ex parte Young*. Second, this decision raises issues of exceptional importance concerning the enforceability of federally-approved state programs under SMCRA. By denying that enforceability, it disrupts federal and citizen enforcement of SMCRA. Third, the decision conflicts with this Court's decision in *Arkansas v. Oklahoma* and numerous federal court decisions concerning the enforceability of federally-approved state programs under other federal statutes based on "cooperative federalism." Finally, the Fourth Circuit and the West Virginia Supreme Court of Appeals have reached opposite conclusions concerning the enforceability of West Virginia's approved state program under SMCRA.

I. The Court of Appeals' Decision Conflicts With *Ex parte Young* and *Coeur d'Alene* by Rejecting An Explicit Grant of Federal Court Jurisdiction to Enjoin a Violation of a Federal Statute and by Relying on the Availability of a State Court Remedy

Regardless of whether West Virginia's state program is

federal or state law, Bragg alleged, and the district court found, that the Director of DEP had violated his nondiscretionary duty under § 510 of SMCRA to withhold approval of permits that do not comply with SMCRA and the approved state program. App. 82a-83a. That violation of federal law formed a separate basis for the district court's grant of prospective declaratory and injunctive relief. The district court's issuance of an injunction to compel compliance with that federal law falls squarely within the scope of the *Ex parte Young* exception to the Eleventh Amendment.

The court of appeals dismissed this claim on the grounds that a West Virginia state law is identical to § 510,[2] that this state law was approved by OSM, and that a state regulator's explicit nondiscretionary duty under § 510 to comply with *both* SMCRA and the state program cannot be enforced in a federal court. In effect, the court of appeals held that the supremacy of federal law under the Constitution is displaced and only state law is enforceable. This conflicts with the core Eleventh Amendment principle underlying *Ex parte Young*. The "entire basis" for that doctrine is to "vindicate the supreme authority of federal law." *Pennhurst*, 465 U.S. at 106.

In § 520(a)(2), Congress authorized citizens to sue "the appropriate State regulatory authority" in federal court for injunctive relief whenever it fails "to perform any act or duty under this Act which is not discretionary." 30 U.S.C. § 1270(a)(2). This is a direct Congressional restatement of the *Ex parte Young* principle. *Cf. Seminole Tribe v. Florida*, 517 U.S. 44, 75 n. 17 (1996) (citing a similar Clean Water Act citizen

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[2]In fact, they are not identical. The state statute prohibits permit approval unless "all the requirements of this article and rules thereunder have been complied with." W.Va.Code 22-3-18(b)(1) (App. 110a). The federal statute prohibits permit approval unless "all the requirements of this chapter and the State or Federal program have been complied with." 30 U.S.C. § 1260(b)(1).

suit provision, 33 U.S.C. § 1365(a), as an example of a statute in which "Congress implicitly authorized suit under *Ex parte Young*"). The "duty under this Act" that Bragg sought to enforce in this case is the federal duty of a state regulator under § 510(b)(1) to withhold approval of permit applications that do not comply with "all the requirements of this chapter *and* the State or Federal program . . . ." *Id.* § 1260(b)(1) (emphasis added). The district court found that a West Virginia state official had violated § 510 and, pursuant to § 520(a)(2), enjoined that official from violating § 510. The Fourth Circuit effectively erased these two federal statutory provisions from the U.S. Code.

Congress believed that citizen suits under § 520 were so important that it provided that the availability of state judicial review of state-issued permits would not preclude such suits against a state regulatory authority. *Id.* § 1276(e) ("the availability of [judicial] review [in state courts] shall not be construed to limit the operation of the rights established in section 520 [30 U.S.C. § 1270] except as provided therein"). Under the court of appeals' ruling, however, the "the concerns that gave rise to the exception of *Ex parte Young evaporate*" when a state judicial remedy is available to enforce an approved state program. App. 25a (emphasis added).

The Fourth Circuit's reliance on the availability of a state court remedy not only overrides this plain statutory language, but also conflicts with *Coeur d'Alene*. App. 24a. In *Coeur d'Alene,* 521 U.S. at 274, only two Justices opined that the availability of a state forum bars recourse to the *Ex parte Young* doctrine. The other seven Justices rejected this approach. 521 U.S. at 293, 315.

In addition, the Fourth Circuit is incorrect that, as in *Pennhurst*, an *Ex parte Young* injunction is not necessary in this case to vindicate federal law. App. 24a. In *Pennhurst*, the district court exercised pendent jurisdiction to issue an

injunction against state officials for violations of state law. 465 U.S. at 104. This Court held that *Ex parte Young* does not apply to pendent state law claims.

In contrast, here the district court exercised federal question jurisdiction under SMCRA to issue an injunction against a state official for violating a federal statute. Even assuming *arguendo* that a federally-approved state program is "solely the product of its own sovereignty," as the Fourth Circuit held (App. 24a), federal law still provides the basis for jurisdiction and relief. In that situation, the state official has a nondiscretionary duty under § 510 to comply with federal law. In § 520, Congress expressly provided that citizens may enforce this duty in federal court. Such a federal court mandate to a state official does not offend state dignity, as the court of appeals asserted (App. 24a), but simply requires state officials to comply with an obligation the state voluntarily assumed under SMCRA's cooperative federalism scheme.[3]

II. The Court of Appeals' Decision Presents an Important Issue of Federal Law Concerning the Enforceability of Federally-Approved State Programs Under SMCRA.

The Fourth Circuit has fashioned an unprecedented interpretation of federal-state relations under SMCRA. Under that interpretation, federally-approved state programs are not

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[3]When West Virginia chose to submit a state program for federal approval, it accepted the federal government's invitation to act as the regulator of surface coal mining in that state. In exchange, Congress required West Virginia to agree to submit to federal jurisdiction under § 520(a)(2) to review its non-discretionary actions for conformity with federal law. West Virginia therefore waived its Eleventh Amendment immunity to the claims raised by Bragg in this case. *Cf. Illinois Bell Tel. Co. v. Worldcom Tech., Inc.*, 179 F.3d 566, 570 (7th Cir. 1999), *cert. granted*, 121 S.Ct. 1224 (2001).

federally enforceable. If that interpretation is not rejected by this Court, it will disrupt the primary federal enforcement mechanisms in SMCRA, contrary to the express intent of Congress.

A citizen's right to sue a state under § 520 extends only "to the extent permitted by the eleventh amendment to the Constitution." 30 U.S.C. § 1270(a)(2). Because *Ex parte Young* was settled law at the time SMCRA was enacted, however, Congress must have believed that citizens could sue state officials for injunctive relief to enforce SMCRA in federal court without raising Eleventh Amendment objections. It would have made no sense for Congress to give citizens that right to sue, but to expect courts to take it away by granting blanket Eleventh Amendment immunity. *American Paper Institute v. American Electric Power Service Corporation*, 461 U.S. 402, 421 (1983) (Court will not "imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other").

However, under the Fourth Circuit's decision, the section of SMCRA allowing citizens to sue state officials in federal court is meaningless. Citizens can never sue a state regulatory authority in federal court, because once a state becomes the regulatory author-ity, it opts out of federal law and is immune from suit. The Fourth Circuit has improperly limited citizens to a state forum, even though Congress expressly rejected that forum as the exclusive remedy.

The effect of the Fourth Circuit's decision on citizen enforcement is already apparent. One month after the court of appeals' decision, a federal district court dismissed another citizen suit against the Director of DEP, even though OSM, DEP, and the district court all agreed that West Virginia's bonding program under SMCRA has violated federal law for more than a decade. *West Virginia Highlands Conservancy*, 147 F. Supp.2d at 481.

The Fourth Circuit's decision also disrupts OSM's authority

to enforce approved state programs under federal law. The court stated that, in states with approved programs, the federal government is "conditionally divest[ed] . . . of *direct* regulatory authority" and "we can look only to State law on matters involving enforcement of the minimum national standards." App. 19a (emphasis in original). The court further stated that although not "*all* of SMCRA's provisions 'drop out,'" the ones that remain are the "structural provisions creating the facility through which the State can attain and can lose its primacy status . . ." App. 21a (emphasis in original).

These statements ignore section 504(b), entitled "Federal enforcement of State programs," which provides that "[i]n the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section 1271 [Section 521] of this title, *of that part of the State program not being enforced by such State*." 30 U.S.C. § 1254(b) (emphasis added). Thus, contrary to the Fourth Circuit's statements, § 504(b) authorizes OSM to enforce the provisions of the State program itself where a State is failing to do so, pursuant to SMCRA § 521.

In turn, § 521(a)(1) provides that where OSM "has reason to believe that any person is in violation of any requirement of this chapter or any permit condition required by this chapter," and a State with an approved program fails within 10 days after notification to take appropriate corrective action or show good cause, OSM "shall immediately order Federal inspection of the surface coal mining operation . . . ." 30 U.S.C. § 1271(a)(1).[4]

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[4]An OSM regulation provides that OSM "shall" issue a notice of violation when a federal inspection reveals a violation of an approved state program. 30 C.F.R. § 843.12(a)(2). *See National Mining Ass'n v. DOI*, 70 F.3d 1345, 1347 (D.C. Cir. 1995) (that rule "permits [OSM] to issue a NOV . . . if it determines there is a violation of . . . the state program").

Furthermore, § 521(b), entitled "Inadequate State enforcement," states that if OSM finds that a state has not adequately demonstrated its capability and intent to enforce its approved program, OSM "shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with the requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith . . . ." *Id.*, § 1271(b). These statutes carry out Congress' intent that "Federal standards are to be enforced by the Secretary on a mine by mine basis for all or part of the State as necessary without a finding that the State regulatory program should be superseded by a Federal permit and enforcement program." S. Rep. No. 128, *supra*, p. 88; 52 Fed. Reg. 21598 (June 8, 1987). Thus, by SMCRA's express terms, OSM has the continuing responsibility to enforce the requirements of an approved state program as a matter of federal law where a state has failed to do so. These OSM enforcement proceedings are entirely federal, since administrative proceedings are subject to the federal Administrative Procedure Act, judicial review of those proceedings is in federal court, and direct judicial enforcement proceedings are filed in federal court. 30 U.S.C. §§ 1271(c), 1275(a)(2), 1276(a)(2).

The Fourth Circuit's decision disrupts this statutory enforcement authority by holding that, after OSM approves a state program, federal statutes and regulations "drop out" as operative provisions and are re-engaged only if OSM revokes the program. App. 20a-21a. As a result, states with approved programs can violate federal law with the knowledge that OSM's primary remaining enforcement tool is revocation of state primacy and substitution of a federal program. This drastic power has only been exercised once by OSM in the last 24 years. 49 Fed. Reg. 38874 (Oct. 1, 1984) (Tennessee). Currently, there are 24 primacy states that administer approved

state programs, while 12 states have federal programs. OSM *Annual Report* 22, 25 (2000).

Thus, the Fourth Circuit's decision disrupts citizen and federal enforcement of SMCRA within that Circuit, which includes two major coal-producing states. West Virginia and Virginia were the second and ninth largest producers of coal in the country in 1999. Energy Information Administration, *Coal Industry Annual 1999*, p. 4, Table 1. Those two states are left to police themselves, with no effective federal oversight.

The Fourth Circuit's interpretation of SMCRA, which erroneously misconstrued and elevated the words "exclusive jurisdiction" in the statute above all others, leads to a result that is contrary to Congressional intent and OSM's long-standing statutory and administrative interpretation.[5] Nothing in SMCRA provides that federal law becomes inoperative once a state program is approved. On the contrary, multiple provisions in SMCRA demonstrate that an approved state program is enforceable as federal law. *See* pp. 3-4, *infra*. These provisions demonstrate that Congress defined the state role as administering the federal law of SMCRA through the federally-approved state program.

Furthermore, OSM has consistently interpreted the provisions of approved State programs as federal law enforceable in federal court, in two rulemaking proceedings and in two cases in the court of appeals. *See* pp. 4-5, *infra*. OSM's first pronouncement was contemporaneous with the enactment of SMCRA and is therefore entitled to considerable deference. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844 (1984); *Lowe v. SEC*, 472 U.S. 181, 216 (1985) ("[a]n agency's construction of legislation that it is charged with enforcing is entitled to

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[5]As the Fourth Circuit held in *Molinary*, "Exclusive regulatory jurisdiction simply does not encompass exclusive adjudicatory jurisdiction." 125 F.3d at 236.

substantial weight, particularly when the construction is contemporaneous with the enactment of the statute"). OSM took the same position in its two appellate briefs in this case and in *Molinary*. 125 F.3d at 235 n. 4.

The panel's decision not only does violence to the plain statutory language and its administrative interpretation, but also conflicts with the legislative history of SMCRA. When it enacted SMCRA in 1977, Congress considered a "states' rights amendment," which proposed that "[i]f the Secretary finds that State law is equal to or more stringent than [federal] standards . . ., then the State shall retain exclusive jurisdiction *pursuant to State law* over all surface coal mining operations in such State . . ." 123 Cong. Rec. 15581 (1977), Amendment No. 277, § 429(a)(6) (emphasis added). This amendment would have allowed states "to get their program certi-fied in 24 months as to environmental and reclamation standards and they opt out of this bill and run their own program" under state law. *Id.* at 15584 (remarks of Sen. Domenici). The Senate rejected this amendment by a vote of 51 to 39. *Id.* at 15591. Instead, Congress passed the current version of § 1253(a), which uses the term "exclusive jurisdiction" without the qualification that it is "pursuant to State law," and § 1260(b), which provides that, as a matter of federal law, mining permits must be consistent with SMCRA and a federally-approved state program. Thus, by rejecting the states' rights amendment, Congress allowed only two alternatives (an exclusively federal program or a federally-approved state program), and rejected the concept of a program under exclusively state law that the Fourth Circuit has now adopted. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *I.N.S. v. Cardoza Fonseca*, 480 U.S. 421, 442-43 (1987).

The Fourth Circuit's decision is therefore inconsistent with the plain language of the statute, OSM's long-standing administrative interpretation, and the legislative history. The effect of that decision is to disrupt the primary mechanisms for citizen and federal enforcement of federally-approved state programs under an important federal statute.

III. The Court of Appeals' Decision Conflicts with *Arkansas v. Oklahoma* and with Numerous Federal Court Decisions Concerning the Enforceability of Federally-Approved State Programs Under Federal Statutes Based on "Cooperative Federalism."

The Fourth Circuit's new interpretation of "cooperative federalism" threatens to undermine federal authority not only under SMCRA, but under many other federal statutes. SMCRA is a "program of cooperative federalism" that "is replicated in numerous federal statutory schemes." *New York v. U.S.*, 505 U.S. 144, 167-68 (1992). One of those statutes is the Clean Water Act (CWA). "Like the SMCRA, the [Clean Water Act (CWA)] sets up a system of 'cooperative federalism,' in which states may choose to be primarily responsible for running federally-approved programs." *Southern Ohio Coal v. OSM*, 20 F.3d 1418, 1427 (6th Cir. 1994), *cert. denied*, 513 U.S. 927 (1994). "Under both the CWA and SMCRA, the responsible federal agency retains oversight power to ensure compliance with federal standards." *Id.* at 1428.

In *Arkansas v. Oklahoma*, 503 U.S. 90, 110 (1992), this Court recognized the "federal character" of state pollution standards under the CWA.[6] The Court construed an EPA regulation that

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[6]In *EPA v. Oklahoma*, decided together with *Arkansas v. Oklahoma*, EPA stated that "the showing necessary to determine under the CWA whether there is compliance with any particular state [pollution] standard is itself *a*

required CWA discharge permits to comply "with the applicable water quality requirements of all affected States." 40 C.F.R. § 122.4(d). The Court held that "this regulation effectively incorporates into federal law those state-law standards the Agency reasonably determines to be 'applicable'" and those standards "are part of the federal law of water pollution control." 503 U.S. at 110.

As in *Arkansas*, OSM "effectively incorporates into federal law" those state program provisions that it has approved. OSM specifically codified and referenced West Virginia's buffer zone rule in the Code of Federal Regulations. 30 C.F.R. §§ 900.11, 948.15 (App. 109a). State standards under the Clean Water Act and SMCRA are directly comparable because both require federal approval.[7] When OSM approved and incorporated West Virginia's buffer zone rule in the Code of Federal Regulations, that rule therefore became part of the federal law of SMCRA. Furthermore, since § 510(b) expressly requires West Virginia to adhere to its state program, that statute incorporates the state program into the federal law of SMCRA.

The court of appeals attempted to distinguish *Arkansas*, stating that "[t]he statutory federalism of SMCRA is quite unlike the cooperative regime under the Clean Water Act . . ." App. 18a. To support that conclusion, the court explained:

> As the Supreme Court noted [in *Arkansas*], one of the Clean Water Act's regulations "effectively incorporate[d]" State law

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matter of federal, not state, law." Brief for Petitioner, O.T. 1991, No. 90-1266, p. 18 n. 21 (emphasis added).

[7]EPA must review and approve state water quality standards under 33 U.S.C. § 1313(c) before they become effective. *Miccosukee Tribe of Indians v. United States*, 105 F.3d 599, 601 (11th Cir. 1997). Similarly, OSM must review and approve state mining programs under 30 U.S.C. § 1253 and 30 C.F.R. § 732.17(g) before they become effective.

> into the unitary federal enforcement scheme, making State law, in certain circumstances, federal law. Under SMCRA, in contrast, Congress designed a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the State regulatory authority, depending on whether the State elects to regulate itself or to submit to federal regulation.

Id. That statement is devoid of any analysis of the actual regulatory process for approving state programs under SMCRA, and wrongly assumes that the phrase "exclusive jurisdiction" in § 503(a) overrides the reality of OSM's codification of approved state programs. The court of appeals further posited that SMCRA, unlike the Clean Water Act, evidences the "absence of an explicit incorporation of State law into federal law." App. 23a. However, that statement is incorrect and ignores OSM's incorporation of West Virginia's buffer zone rule into the Code of Federal Regulations. Thus, the Fourth Circuit's decision is inconsistent with this Court's holding in *Arkansas* concerning the incorporation of state law into federal statutes that are based on cooperative federalism.

The Fourth Circuit's decision is also inconsistent with numerous other federal decisions holding that federally-approved state programs under federal statutes are federally enforceable, including decisions under SMCRA, the CWA, the Resource Conservation and Recovery Act (RCRA), the Clean Air Act (CAA), and the Individuals with Disabilities Education Act (IDEA). These cases involve suits against both state officials and non-governmental parties. Both types of cases are relevant, because if the Fourth Circuit's reasoning were adopted, there would be no federal law to enforce against either party, and therefore no federal jurisdiction.

1. SMCRA. In discussing the federal-state relationship under SMCRA, the *en banc* D.C. Circuit has recognized the basic principle that citizens have "the right to sue in federal court, to

compel compliance with the state program and its permits." *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 519 (D.C.Cir. 1981). The Fourth Circuit itself previously held in *Molinary*, 125 F.3d at 236, that "[i]t may reasonably be said that once the Secretary approves a state surface coal mining and reclamation program, the rules, regulations, orders, and permits issued under that program are 'issued,' in the language of [30 U.S.C. § 1270(f)], 'pursuant to' SMCRA" and are therefore enforceable in federal court.[8]

2. CWA. This Court has held that conditions in discharge permits issued pursuant to approved state permit programs under the CWA are federally enforceable in CWA citizen suits. *EPA v. California*, 426 U.S. 200, 224-25 (1976). Interpreting the CWA's citizen suit provision, the Ninth Circuit has held that "Congress implicitly intended to authorize citizens to bring *Ex parte Young* suits against state officials with the responsibility to comply with clean water standards and permits." *NRDC v. California DOT*, 96 F.3d 420, 424 (9th Cir. 1996).

3. RCRA. The Ninth Circuit has held that approved state

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[8] *Molinary* involved a citizen suit against a mine operator, while the instant case is a citizen suit against a state agency. Thus, as a technical matter, *Molinary* did not involve the Eleventh Amendment. However, the two cases presented the exact same question–whether an approved state program is state or federal law–and reached exact opposite conclusions.

In *Haydo v. Amerikohl Mining, Inc.*, 830 F.2d 494 (3d Cir. 1987), the Third Circuit reached the opposite result from *Molinary*, and held that jurisdiction over violations of an approved state program by a mine operator lies exclusively in state courts. Yet, in doing so, *Haydo* explicitly recognized that "citizen suits against state and federal governmental defendants may be predicated directly upon violations of the provisions of SMCRA . . ." because "[t]he principal purpose of the citizen suit provision was to provide 'a practical and legitimate method of assuring the *regulatory authority's* compliance with the requirements of the act.' Legislative History at 625." 803 F.2d at 496-97 (emphasis in original).

programs under the Resource Conservation and Recovery Act (RCRA) are federally enforceable in citizen suits. *Ashoff v. City of Ukiah*, 130 F.3d 409, 411 (9th Cir. 1997). "The federal criteria [under RCRA] give the state standards legal effect under federal law" and citizen suits can be brought in federal court for non-compliance with those state standards. *Id.* EPA has repeatedly stated that citizens can sue in federal court to enforce these federal criteria in states with approved RCRA programs. *Id.* at 411-12. The majority of federal district courts have also allowed RCRA citizen suits in states with approved programs, reasoning that federally-approved state programs have "become effective pursuant to" RCRA, within the meaning of RCRA's citizen suit provision, 42 U.S.C. § 6972(a)(1)(A).[9]

4. CAA. Five circuits have held that approved State Implementation Plans (SIPs) under the Clean Air Act (CAA), 42 U.S.C. § 7410, are federally enforceable in citizen suits. *Espinosa v. Roswell Tower, Inc.*, 32 F.3d 491, 492 (10th Cir.

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[9]The district court cases allowing suit are: *L.E.A.D. (Lead Environmental Awareness Development) v. Exide Corp.*, 1999 WL 124473, at *9 (E.D.Pa. 1999); *Evco Associates, Inc. v. C.J. Saporito Plating Co.*, 1995 WL 571438, at *2-*3 (N.D. Ill. 1995); *Glazer v. American Ecology Environmental Services Corp.*, 894 F.Supp. 1029, 1040 (E.D.Tex. 1995); *Acme Printing Ink Corp. v. Menard*, 881 F. Supp. 1237, 1244 (E.D. Wis. 1995); *Sierra Club v. Chemical Handling Corp.*, 824 F.Supp. 195, 197 (D.Colo. 1993); *Lutz v. Chromatex, Inc.*, 725 F. Supp. 258, 261 (M.D. Pa. 1989); *Murray v. Bath Iron Works Corp.*, 867 F. Supp. 33, 43 (D. Me. 1994); and *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of City of New York*, 1996 WL 131863, at *7-*8 (S.D.N.Y. 1996). The district court cases not allowing suit are: *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 124 (N.D. Ill. 1994); *City of Heath v. Ashland Oil, Inc.*, 834 F. Supp. 971, 979-80 (S.D. Ohio 1993); *Williamsburgh-Around-the-Bridge Block Assn. v. Jorling*, 1989 WL 98631, at *3-*4 (N.D.N.Y. 1989); *Thompson v. Thomas*, 680 F.Supp. 1, 3 (D.D.C.1987); and *Luckie v. Gorsuch*, 13 ELR 20406 (D.Ariz.1983).

1994); *Her Majesty the Queen v. City of Detroit*, 874 F.2d 332, 335 (6th Cir. 1989); *American Lung Ass'n v. Kean*, 871 F.2d 319, 322, 325 (3d Cir. 1989) ("once EPA approves a SIP the state is obligated to comply with it"; citizen suits may be filed against state officials in their capacity as regulators "to make sure they enact the regulatory schemes to which they have committed themselves"); *Friends of the Earth v. Carey*, 535 F.2d 165, 173 (2d Cir. 1976); *Union Electric Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) ("[u]pon approval or promulgation of a [SIP], the requirements thereof have the force and effect of federal law . . ."), *aff'd*, 427 U.S. 266 (1976).

5. IDEA. Under the Individuals with Disabilities Education Act, a state may receive federal financial assistance for educating disabled students if the state submits a plan that meets federal minimum criteria and is approved by the Secretary of Education. 20 U.S.C. §§ 1412, 1413. In *Geis v. Board of Education of Parsippany-Troy Hills*, 774 F.2d 575, 581 (3d Cir. 1985), the Third Circuit rejected a school board's claim that an order requiring it to comply with standards in the state plan violated the Eleventh Amendment, and held that "federal law incorporates any state standards that go beyond the minimum standards of the Act, and thereby confers on the federal courts authority to enforce such standards under their 'federal question' jurisdiction." *See also David D. v. Dartmouth School Committee*, 775 F.2d 411, 419 (1st Cir. 1985) ("Congress intertwined federal and state standards into one body of law").

Thus, the Fourth Circuit's decision conflicts with this Court's decision in *Arkansas* and with numerous other federal court decisions concerning the structure of federal-state relations under federal statutes based on "cooperative federalism."

IV. The Federal Court of Appeals and the West Virginia Supreme Court of Appeals Have Reached Opposite Conclusions Concerning the Enforceability of West Virginia's State Program Under SMCRA.

In *Canestraro v. Faerber*, 374 S.E.2d 319 (W.Va. S.Ct. 1988), county residents alleged that a provision in West Virginia's state program was less stringent than OSM's federal regulation, and was therefore invalid, even though it had been federally approved by OSM. The West Virginia Supreme Court of Appeals framed the issue as "whether the requirements of the federal act [SMCRA] continue to have force and effect after the state program has been approved." *Id.* at 320. The court answered this question affirmatively, stating that "when there is a conflict between the federal and state provisions, the less restrictive state provision must yield to the more stringent federal provision *notwithstanding the administrative approval of the state law by OSM.*" *Id.* at 321 (emphasis added). The West Virginia Supreme Court has reaffirmed this principle in two recent decisions. *DK Excavating, Inc. v. Miano*, 549 S.E.2d 280 (W.Va. S.Ct. 2001); *Antco, Inc. v. Dodge Fuel Corp.*, 550 S.E.2d 622 (W.Va. S.Ct. 2001).

The Fourth Circuit held that, after a state program is approved by OSM, federal law "'drop[s] out' as operative law" and state laws "become the sole operative law." App. 20a-21a. In contrast, the West Virginia Supreme Court has held that federal law continues to be operative after a state program is approved. Thus, the federal circuit court for West Virginia and the highest state court in West Virginia disagree about whether federal law under SMCRA continues to be operative in West Virginia when an approved state program is in effect.

This disagreement creates confusion in West Virginia about the validity and content of West Virginia's state mining program. The mining industry and the public do not know

whether federal law continues to apply, and therefore cannot determine with certainty the standards against which mining activity is to be regulated and enforced. *Canestraro* demands that the state court follow federal law, if that law is more stringent than the state program. However, *Bragg* demands that the state court follow exclusively state law, regardless of whether federal law is more stringent, because federal law is inoperative. Only this Court can resolve this confusion and establish the proper relationship between state and federal law under SMCRA.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 99-2443, 99-2445, 99-2446, 99-2447, 99-2448,
99-2683, 00-1338, 00-1339 (Consolidated)

PATRICIA BRAGG; JAMES W. WEEKLEY;
SIBBY R. WEEKLEY; WEST VIRGINIA HIGHLANDS
CONSERVANCY; CARLOS GORE; LINDA GORE;
CHERYL PRICE; JERRY METHENA,
Plaintiffs-Appellees,

v.

WEST VIRGINIA COAL ASSOCIATION; WEST
VIRGINIA MINING AND RECLAMATION
ASSOCIATION, HOBET MINING, INCORPORATED;
CATENARY COAL COMPANY; MINGO-LOGAN
COAL COMPANY; WESTERN POCAHONTAS
PROPERTIES LIMITED PARTNERSHIP;
NATIONAL COUNCIL OF COAL LESSORS,
INCORPORATED; INTERNATIONAL UNION, UNITED
MINE WORKERS OF AMERICA,
Intervenors/Defendants-Appellants,

and

DANA ROBERTSON, Colonel, District Engineer, U.S.
Army Corps of Engineers, Huntington District; JOE N.
BALLARD, Lieutenant General, Chief of Engineers and

Commander of the U.S. Army Corps of Engineers; MICHAEL D. GHEEN, Chief to the Regulatory Branch, Operations and Readiness Division, U.S. Army Corps of Engineers, Huntington District; MICHAEL C. CASTLE, Director, West Virginia Division of Environmental Protection,
Defendants-Appellants,

Argued: December 7, 2000
Decided: April 24, 2001
Rehearing and Rehearing En Banc Denied: July 13, 2001

Before NIEMEYER, LUTTIG, and WILLIAMS, Circuit Judges.

Affirmed in part, vacated in part, and remanded with instructions by published opinion. Judge Niemeyer wrote the opinion, in which Judge Luttig and Judge Williams joined.

NIEMEYER, Circuit Judge:

This case, which is of great importance to the citizens of West Virginia, was commenced by some of its citizens and an environmental group against the Director of the West Virginia Division of Environmental Protection to challenge his issuance of permits for mountaintop-removal coal mining in the State. The complaint alleged that the Director "has routinely approved surface coal mining permits which decapitate the State's mountains and dump the resulting waste in nearby valleys, burying hundreds of miles of headwaters of West Virginia's streams," and it requested an injunction prohibiting the further issuance of such permits.

The public concern over this issue is demonstrated by the remarkably broad spectrum of interests represented in these proceedings, as well as by their unusual alliances, in both the political and legal arenas. On one side of the dispute are plaintiffs, consisting of a group of private citizens and environmental groups who oppose West Virginia's current permitting practices, and they enjoy the support of the U.S. Environmental Protection Agency. On the other side are the coal mining companies, who are allied with the United Mine Workers of America and the West Virginia State political establishment, all of whom favor current mining practices. And, until this litigation was commenced, these practices had the approval of the U.S. Army Corps of Engineers, although the United States' interests are now aligned with the position taken by the U.S. Environmental Protection Agency.

Following extensive and careful consideration of motions for sum- mary judgment on the substantive issues presented and cross-motions to dismiss, the district court denied the motions to dismiss, found that West Virginia's approval of mountaintop mining practices violated both federal and State law, and enjoined the State from issuing further permits that authorize dumping of mountain rock within 100 feet of intermittent and perennial streams.

Because we conclude that the doctrine of sovereign immunity bars the citizens from bringing their claims against an official of West Virginia in federal court, we vacate the district court's injunction and remand with instructions to dismiss the citizens' complaint without prejudice so that they may present their claims in the proper forum. We affirm, however, the district court's earlier consent decree approving a settlement of some of the claims asserted. The reasons for our rulings follow.

I

Mountaintop-removal coal mining, while not new, only became widespread in West Virginia in the 1990s. Under this method, to reach horizontal seams of coal layered in mountains, the mountaintop rock above the seam is removed and placed in adjacent valleys; the coal is extracted; and the removed rock is then replaced in an effort to achieve the original contour of the mountain. But because rock taken from its natural state and broken up naturally "swells," perhaps by as much as 15 to 25%, the excess rock not returned to the mountain -- the "overburden" -- remains in the valleys, creating "valley fills." Many valley fills bury intermittent and perennial streams and drainage areas that are near the mountaintop. Over the years, the West Virginia Director of Environmental Protection (the "Director" or "State Director"), as well as the U.S. Army Corps of Engineers, has approved this method of coal mining in West Virginia.

The disruption to the immediate environment created by mountaintop mining is considerable and has provoked sharp differences of opinion between environmentalists and industry players. *See, e.g.*, Penny Loeb, *Shear Madness*, U.S. News & World Rept., Aug. 11, 1997. As Loeb reported these differences of opinion, environmentalists decry the "startling" change in the topography, which leaves the land more subject to floods, results in the pollution of streams and rivers, and has an "incalculable" impact on wildlife. The environmentalists also criticize the mining process itself, which cracks foundations of nearby houses, causes fires, creates dust and noise, and disrupts private wells. The coal companies concede that the process changes the landscape, but note on the positive side that land is reclaimed, that grass, small shrubs, and trees are planted, and that waterfowl ponds are added. Moreover, the companies observe that mining is critical to the West Virginia economy

and creates high-paying jobs in the State.

In July 1998, Patricia Bragg, along with eight other West Virginia citizens and the West Virginia Highlands Conservancy (collectively "Bragg"), commenced this action against officials of the U.S. Army Corps of Engineers and the State Director. Bragg alleged that the State Director, in granting surface coal mining permits, "engaged in an ongoing pattern and practice of violating his non-discretionary duties under the Surface Mining Control and Reclamation Act [of 1977, 30 U.S.C. § 1201 *et seq.*] and the West Virginia state program approved under that statute." More particularly, she alleged that the Director consistently issued permits to mining operations, without making requisite findings, that (1) authorized valley fills, (2) failed to assure the restoration of original mountain contours, and (3) violated other environmental protection laws. She asserted that the Director violated his federal- and State-law duty to "withhold approval of permit applications that are not complete and accurate and in compliance with all requirements of the state program." She also alleged that the Corps of Engineers breached its duties under federal law.

The Director moved to dismiss the complaint, asserting that Bragg's claims were barred by the Eleventh Amendment and that the court, in any case, lacked subject matter jurisdiction. He argued that although only injunctive relief and declaratory judgments against him in his official capacity were sought, the *Ex parte Young* exception to Eleventh Amendment immunity did not apply because Bragg's claims arose under State law. The district court disagreed and permitted Bragg's suit to proceed against the Director.

All but two counts of the complaint were settled,[1] and the

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[1]The counts of the complaint directed against the U.S. Army Corps of Engineers for violation of the Clean Water Act, 33 U.S.C. § 1251 et seq., the National Environmental Policy Act, 42 U.S.C. § 4321 et seq., and the

court resolved Counts 2 and 3 on motions for summary judgment. Both of these counts addressed a West Virginia regulation, enacted to conform with a federal regulation, that established 100-foot "buffer zones" around "perennial" and "intermittent" streams, within which surface mining activities may not disturb the land, unless the State agency "specifically authorizes" such activities after making certain findings. W. Va. Code St. R. tit. 38 § 2-5.2; *see also* 30 C.F.R. § 816.57 (the federal counterpart).[2] Count 2 alleged that the Director engaged in a pattern and practice of approving mountaintop removal operations without even attempting to make the required findings, and Count 3 alleged that because valley fills inherently

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Administrative Procedure Act, 5 U.S.C. § 501 et seq., were settled on December 23, 1998, and the district court approved the settlement as "fair, adequate, reasonable, and faithful to the [applicable] environmental statutes." *Bragg v. Robertson*, 54 F. Supp. 2d 653, 670 (S.D. W. Va. 1999). The counts directed against the State Director, except for Counts 2 and 3, were settled on July 26, 1999, and the court approved that settlement by entry of a consent decree, dated February 17, 2000. *See Bragg v. Robertson*, 83 F. Supp. 2d 713, 722 (S.D. W. Va. 2000). The coal companies and associations, but not the Director, have appealed the consent decree, asserting that the court did not have jurisdiction over the State Director because (1) 30 U.S.C. § 1270(a)(2) did not provide jurisdiction, and (2) the Eleventh Amendment barred the action against the Director.

[2]2 W. Va. Code St. R. tit. 38 § 2-5.2 states

No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.

have an adverse effect upon stream ecology and cause violations of water quality standards, the findings required by the State regulation could never be made, at least not accurately, for valley fill permits. In entering summary judgment in favor of Bragg, the district court ruled (1) that "the Director has a nondiscretionary duty to make the findings required under the buffer zone rule before authorizing any incursions, including valley fills, within one hundred feet of an intermittent or perennial stream," *Bragg v. Robertson*, 72 F. Supp. 2d 642, 661 (S.D. W. Va. 1999); and (2) that "the Director has a nondiscretionary duty under the buffer zone rule to deny variances for valley fills in intermittent and perennial streams because they necessarily adversely affect stream flow, stream gradient, fish migration, related environmental values, water quality and quantity, and violate state and federal water quality standards," *id.* at 663. Based on these rulings, the court enjoined the Director "from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal." *Id.* The district court stayed its injunction, however, pending appeal to this court. *See Bragg v. Robertson*, 190 F.R.D. 194, 196 (S.D. W. Va. 1999).

The State Director appealed, challenging not only the district court's substantive rulings on Counts 2 and 3, but also its rulings that the Eleventh Amendment did not bar this suit against him and that the federal court had jurisdiction to consider Bragg's claims. Coal mining companies and coal associations, that had intervened in the case, also appealed, again contesting the district court's substantive rulings on Counts 2 and 3 and challenging the district court's jurisdiction both to enter the injunction and to enter the February 17, 2000 consent decree approving the settlement of the other claims against the Director. Finally, the United States appealed, challenging the breadth of the district court's injunction.

II

The Surface Mining Control and Reclamation Act of 1977 ("SMCRA") was enacted to strike a balance between the nation's interests in protecting the environment from the adverse effects of surface coal mining and in assuring the coal supply essential to the nation's energy requirements. *See* 30 U.S.C.§ 1202(a), (d), (f); *see also Hodel v. Va. Mining & Reclamation Ass'n*, 452 U.S. 264, 268-69 (1981). The Act accomplishes these purposes through a "cooperative federalism," in which responsibility for the regulation of surface coal mining in the United States is shared between the U.S. Secretary of the Interior and State regulatory authorities. See H.R. Rep. No. 95-218, at 57 (1977) (hereinafter "Legislative History"), *reprinted in* 1977 U.S.C.C.A.N. 593, 595. Under this scheme, Congress established in SMCRA "minimum national standards" for regulating surface coal mining and encouraged the States, through an offer of exclusive regulatory jurisdiction, to enact their own laws incorporating these minimum standards, as well as any more stringent, but not inconsistent, standards that they might choose. See Legislative History, at 167, *reprinted in* 1977 U.S.C.C.A.N. at 698; 30 U.S.C. § 1255(b).

To implement this cooperative federalism, SMCRA directs the U.S. Secretary of the Interior to develop a "federal program" of regulation that embodies the minimum national standards and to consider for approval any "State programs" that are submitted to it for approval. To obtain approval of its program, a State must pass a law that provides for the minimum national standards established as "requirements" in SMCRA and must also demonstrate that it has the capability of enforcing its law. *See* 30 U.S.C. § 1253(a). Once the Secretary is satisfied that a State program meets these requirements and approves the program, the State's laws and regulations implementing the program become operative for the regulation of surface coal

mining, and the State officials administer the program, *see id.* § 1252(e), giving the State "exclusive jurisdiction over the regulation of surface coal mining" within its borders, *id.* § 1253(a). If, however, a State fails to submit a program for approval, or a program that it submits is not approved, or approval of a State's program is withdrawn because of ineffective enforcement, then the federal program becomes applicable for the State, and the Secretary becomes vested with "exclusive jurisdiction for the regulation and control of surface coal mining and reclamation operations taking place[in the] State." *Id.* § 1254(a); *see also* Legislative History, at 85-86, reprinted in 1977 U.S.C.C.A.N. at 622.

Thus, SMCRA provides for either State regulation of surface coal mining within its borders or federal regulation, but not both. The Act expressly provides that one or the other is exclusive, *see* 30 U.S.C. §§ 1253(a), 1254(a), with the exception that an approved State program is always subject to revocation when a State fails to enforce it, *see id.* §§ 1253(a); 1271(b). Federal oversight of an approved State program is provided by the Secretary's obligation to inspect and monitor the operations of State programs. *See id.* §§ 1267, 1271. Only if an approved State program is revoked, as provided in § 1271, however, does the federal program become the operative regulation for surface coal mining in any State that has previously had its program approved. *See id.* §§ 1254(a), 1271.

In sum, because the regulation is mutually exclusive, either federal law or State law regulates coal mining activity in a State, but not both simultaneously. Thus, after a State enacts statutes and regulations that are approved by the Secretary, these statutes and regulations become operative, and the federal law and regulations, while continuing to provide the "blueprint" against which to evaluate the State's program, "drop out" as operative provisions. They are reengaged only following the instigation of a § 1271 enforcement proceeding by the Secretary

of the Interior.

In the case before us, West Virginia submitted a program to the Secretary in 1980 for approval, and the Secretary approved the program in 1981, thus granting West Virginia "primacy" status -- a status under which its law exclusively regulates coal mining in the State. *See* 30 C.F.R. § 948.10 (noting the Secretary's approval of West Virginia's plan). As part of this program, the West Virginia legislature enacted its own statute entitled the "Surface Coal Mining and Reclamation Act" (the "West Virginia Coal Mining Act"). *See* W. Va. Code § 22-3-1 *et seq.* As amended, the West Virginia Coal Mining Act vests the Director of the State Division of Environmental Protection with the authority to administer the Act and otherwise to provide for the regulation of surface coal mining within the State. *See* W. Va. Code § 22-3-4. The West Virginia Act sets out minimum performance standards that mirror those found in SMCRA, and the State Director has exercised his statutorily granted power to promulgate State regulations that parallel those issued by the Secretary of the Interior pursuant to the federal Act. See 38 W. Va. Code St. R. § 2-1 *et seq*. Thus, since the Secretary's approval of the West Virginia program in 1981, the Director has served as the exclusive permitting authority in the State, and West Virginia has maintained "exclusive jurisdiction," with certain exceptions inherent in the federal oversight provisions, over surface mining regulation within its borders.

III

Bragg brought this action against the State Director under the "citizen suit" provision of SMCRA, which provides in relevant part:

[A]ny person having an interest which is or may be adversely

affected may commence a civil action on his own behalf to compel compliance with this chapter –

* * *

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this chapter which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

30 U.S.C. § 1270(a)(2).

The State Director asserted below and now contends that, as an official of West Virginia who has been sued in his official capacity, he is immune from suit in federal court under the doctrine of sovereign immunity guaranteed by the Eleventh Amendment. In response to the district court's reliance on *Ex parte Young*, 209 U.S. 123 (1908), to overcome the Eleventh Amendment bar, the Director argues that the *Ex parte Young* exception does not apply because the issues in this case involve enforcement of West Virginia law, not federal law. Acknowledging that Bragg nominally asserts violations of both federal and State law, the Director argues that Bragg actually seeks to compel the Director "to comply with the approved West Virginia surface mining program" because once a State program is approved by the Secretary of the Interior, it is State law, not federal law, that governs. Thus, the Director concludes that the *Ex parte Young* exception for ongoing federal violations does not apply; rather, *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), controls. In *Pennhurst*, the Supreme Court held the *Ex parte Young* doctrine inapplicable to a suit brought against a State official to compel

his compliance with State law. *See* 465 U.S. at 106.[3]

Bragg, on the other hand, contends that the *Ex parte Young* exception permits suit against the State Director. She argues first that Congress, by enacting 30 U.S.C. § 1270(a)(2), "authorized citizens to bring *Ex parte Young* suits against State officials who have the responsibility to comply with SMCRA and federally-approved State programs under that Act." Second, she asserts that her suit seeks to enforce federal, not State, law because (1) States with federally approved programs are still bound by federal statutory mandates that govern their activities, and (2) the buffer zone regulation promulgated by West Virginia is federal law. Finally, she maintains that West Virginia, in choosing "to submit a state program for federal approval, accept[ed] the federal government's invitation to act

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[3]In addition, the State Director argues that SMCRA provides Bragg a detailed remedial scheme and that a court should not cast aside that scheme to permit an action against a State officer based upon Ex parte Young. The Director details the scheme as follows:

> Under 30 U.S.C. § 1267, the Secretary [of the Interior] retains authority to make "such inspections of any surface coal mining and reclamation operations as are necessary to evaluate the administration of approved State program." SMCRA's regulations contain procedures for making any amendments to the State programs that OSM determines are necessary. 30 C.F.R. part 732. The regulations also prescribe a detailed process for discontinuing state programs that do not continue to meet SMCRA's minimum standards. 30 C.F.R. part 733. This detailed, remedial scheme protects SMCRA's minimum nationwide standards, while preserving the states' vital Eleventh Amendment rights. He grounds this argument on the Supreme Court's decision in *Seminole Tribe v. Florida*, 517 U.S. 44, 53 (1996).

Bragg, on the other hand, asserts that her suit is not displacing a statutorily created scheme but rather is "completely consistent with, and expressly authorized by, SMCRA's legislative scheme." Because we dispose of this case on other grounds, we do not address this argument.

as regulators of surface coal mining in the state." She asserts that West Virginia, by participating in the federal program, agreed to submit to federal jurisdiction under 30 U.S.C. § 1270(a)(2), thereby waiving its Eleventh Amendment immunity.

The district court ruled that SMCRA's grant to citizens to bring suits against State regulatory authorities "to the extent permitted by the eleventh amendment," 30 U.S.C. § 1270(a)(2), amounts to an "implicit authorization" to citizens to bring *Ex parte Young* actions against State officials, and cited *Natural Resources Defense Council v. California Department of Transportation*, 96 F.3d 420, 423-24 (9th Cir. 1996), for support. The court also rejected the Director's argument that State law, not federal law, is being enforced because the State law is incorporated into federal law, and cited *Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992), for support. *See Bragg v. Robertson*, No. 2:98-0636, slip op. at 8 (S.D. W. Va. Oct. 9, 1998).

We begin our analysis by noting that although the literal text of the Eleventh Amendment appears to restrict only Article III diversity jurisdiction, we have come to understand that the Amendment con- firms principles of State sovereign immunity that are embedded in the constitutional structure and thus that it bars "citizens from bringing suits in federal court against their own states." *Litman v. George Mason Univ.*, 186 F.3d 544, 549 (4th Cir. 1999) (citing *Hans v. Louisiana*, 134 U.S. 1 (1890)); *see also Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that sovereign immunity also immunizes a State from private lawsuits brought in its own courts under federal law). And when, as in this case, a suit is brought only against State officials, the suit is barred "when 'the State is the real, substantial party in interest.'" *Pennhurst*, 465 U.S. at 101 (quoting *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945)). This limit on federal judicial power is an

essential element of the constitutional design, as immunity "accords the States the respect owed them as members of the federation," *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddie, Inc.*, 506 U.S. 139, 146 (1993), and protects the States' ability "to govern in accordance with the will of their citizens," *Alden*, 527 U.S. at 751. A State's immunity to suit in federal court is subject to well established and important exceptions, however. *See S.C. State Ports Auth. v. Fed. Maritime Comm'n*, 243 F.3d 165, (4th Cir. 2001) (enumerating six exceptions to Eleventh Amendment immunity). Sovereign immunity does not, for example, prevent the United States itself from bringing suit against an unconsenting State to ensure compliance with federal law. *See United States v. Texas*, 143 U.S. 621, 644-45 (1892). Moreover, Congress may abrogate a State's immunity pursuant to its enforcement power under § 5 of the Fourteenth Amendment. *See Seminole Tribe*, 517 U.S. at 59; *Fla. Prepaid Post Secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 647 (1999) (holding that the Patent Remedy Act was not a § 5 enactment). A State, of course, may waive its immunity by "consenting to be sued in federal court." *Litman*, 186 F.3d at 550 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999)); *see also Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 267 (1997); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985). And, as at issue here, the Eleventh Amendment does not preclude private individuals from bringing suit against State officials for prospective injunctive or declaratory relief designed to remedy ongoing violations of federal law. *See Ex parte Young*, 209 U.S. 123 (1908); *DeBauche v. Trani*, 191 F.3d 499, 505 (4th Cir. 1999) (citing *Green v. Mansour*, 474 U.S. 64, 68 (1985)). Bragg concedes that her suit is, in reality, directed toward the State of West Virginia and therefore that Eleventh Amendment jurisprudence is relevant. She maintains, however, that her suit is authorized by *Ex parte Young*, or, alternatively, that West

Virginia has waived its immunity by participating in the federal program. We address each of these arguments in turn.

A

Although the *Ex parte Young* exception to the Eleventh Amend- ment is well established, its precise contours are not. *See Pennhurst*, 465 U.S. at 101-02; *see also Coeur d'Alene Tribe*, 521 U.S. at 270-80 (opinion of Kennedy, J., joined by Rehnquist, C.J.) (urging a "case-by-case approach" to the application of *Ex parte Young*). At the very least, however, the *Ex parte Young* doctrine provides that "a federal court has jurisdiction over a suit against a state officer to enjoin official actions that violate federal law, even if the State itself is immune from suit under the Eleventh Amendment." *Id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment); *see also Green*, 474 U.S. at 68; *Pennhurst*, 465 U.S. at 102-03. The exception is premised upon the notion, sometimes called a "fiction," *see, e.g., Coeur d'Alene Tribe*, 521 U.S. at 281, that when a State officer violates federal law, he is stripped of his official character, thus losing the "cloak" of State immunity. *See id.* at 288 (O'Connor, J., concurring in part and concurring in the judgment); *Pennhurst*, 465 U.S. at 102; *Ex parte Young*, 209 U.S. at 159-60. Even though "the State itself will have a continuing interest in the litigation whenever State policies or procedures are at stake,"*Coeur d'Alene Tribe*, 521 U.S. at 269; *see also Gr. N. Life Ins. Co. v. Read*, 322 U.S. 47, 51 (1944), a court decree enjoining a State officer from committing future violations of federal law generally will not upset the careful federal balance established by the Constitution and confirmed by the Eleventh Amendment. To preserve this balance, however, "we must ensure that the doctrine of sovereign immunity remains meaningful, while also giving recognition to the need to prevent violations of federal law."

Coeur d'Alene Tribe, 521 U.S. at 269.

But because this balance is a careful one indeed, the Supreme Court has strictly limited the application of the *Ex parte Young* doctrine to circumstances in which injunctive relief is necessary to "give[ ] life to the Supremacy Clause." *Green*, 474 U.S. at 68; *see also Pennhurst*, 465 U.S. at 105 (recognizing that "the need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States"). Thus, a federal court cannot order a State official to remedy past violations of federal law by paying funds out of the State treasury, given that such relief "is in practical effect indistinguishable . . . from an award of damages against the State." *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). And as "it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law," sovereign immunity also bars a court's grant of any type of relief, whether retrospective or prospective, based upon a State official's violation of State law. *Pennhurst*, 465 U.S. at 106.

These exceptions demonstrate that application of the doctrine must entail more than "a reflexive reliance on an obvious fiction." *Coeur d'Alene Tribe*, 521 U.S. at 270. "[J]ust because a private citizen's federal suit seeks declaratory injunctive relief against State officials does not mean that it must automatically be allowed to proceed under an exception to the Eleventh Amendment protection." *Bell Atl. Md., Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279, 294 (4th Cir. 2001). "Such 'empty formalism' would improperly sacrifice the 'real interests served by the Eleventh Amendment.'" *Id.* (quoting *Coeur d'Alene Tribe*, 521 U.S. at 270). Rather, just as the Court did in *Coeur d'Alene Tribe*, we must evaluate the degree to which a State's sovereign interest would be adversely affected by a federal suit seeking injunctive relief against State officials, as well as the extent to which *federal*, rather than State, law must be enforced

to vindicate the federal interest.

The respective federal and State interests revealed in this case make the analysis complex because SMCRA was expressly designed to hand over to the States the task of enforcing minimum national standards for surface coal mining, providing only limited federal mechanisms to oversee State enforcement. Thus, because the federal enactment, in furtherance of its design to advance State interests, creates the potential for exclusive State regulatory authority, the federal interest would seem to be better served by encouraging private citizens to enforce their claims relating to the State enforcement efforts in State, rather than federal, court. A more precise evaluation of this interest, however, as it might affect application of *Ex parte Young*, requires us to return to the statutory structure of SMCRA and the methods by which it employs a cooperative federalism.

B

As we have noted, under SMCRA Congress intended to divide responsibility for the regulation of surface coal mining between the federal government and the States. But characterizing the regulatory structure of SMCRA as "cooperative" federalism is not entirely accurate, as the statute does not provide for *shared* regulation of coal mining. Rather, the Act provides for enforcement of either a federal program or a State program, but not both. Thus, in contrast to other "cooperative federalism" statutes, SMCRA exhibits extraordinary deference to the States. See Mark Squillace, *Cooperative Federalism Under the Surface Mining Control and Reclamation Act: Is This any Way to Run a Government?*, 15 Envtl. L. Rep. 10039 (1985) (calling SMCRA's "broad delegation" to States "unparalleled"); *cf. Bell Atl. Md.*, 240 F.3d at 300 (describing analogously how the Telecommunications Act of 1996 "partially flooded the existing statutory landscape

with specific preempting federal requirements, deliberately leaving numerous islands of State responsibility"). The statutory federalism of SMCRA is quite unlike the cooperative regime under the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, which was construed in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992). As the Supreme Court noted there, one of the Clean Water Act's regulations "effectively incorporate[d]" State law into the unitary federal enforcement scheme, making State law, in certain circumstances, federal law. *Id.* at 110 (emphasis added). Under SMCRA, in contrast, Congress designed a scheme of mutually exclusive regulation by either the U.S. Secretary of the Interior or the State regulatory authority, depending on whether the State elects to regulate itself or to submit to federal regulation. Because West Virginia is a primacy state, its regulation of surface coal mining on nonfederal lands within its borders is "exclusive." *See* 30 U.S.C. § 1253(a); 30 C.F.R. § 948.10. This federal policy of encouraging "exclusive" State regulation was careful and deliberate. The Act's preliminary findings explain that "because of the diversity in terrain, climate, biologic, chemical, and other physical conditions in areas subject to mining operations, the primary governmental responsibility for developing, authorizing, issuing, and enforcing regulations for surface mining and reclamation operations subject to this chapter should rest with the States." 30 U.S.C. § 1201(f). According to the Act, it is the States, not the federal government, that are to "develop[] and implement[ ] a program to achieve the purposes of this chapter." *Id.* § 1202(g). To make this point absolutely clear, SMCRA provides explicitly that when States regulate, they do so exclusively, *see id.* § 1253(a), and when the Secretary regulates, he does so exclusively, *see id.* § 1254(a).

Even so, SMCRA does manifest an ongoing federal interest in assuring that minimum national standards for surface coal mining are enforced. But when a State fails to enforce these

minimum national standards, it does not automatically forfeit the right of exclusive regulation. SMCRA vindicates its national-standards policy through a limited and ordered federal oversight, grounded in a process that can lead ultimately to the withdrawal of the State's exclusive control. *See* 30 U.S.C. §§ 1271, 1267; *see also In Re Permanent Surface Mining Regulation Litig.*, 653 F.2d 514, 520 (D.C. Cir. 1981) (en banc) (hereinafter "*Regulation Litig.*") (describing the oversight process). Until that withdrawal occurs, because an approved State program must include "a *State law* which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this chapter," 30 U.S.C. § 1253(a)(1) (emphasis added), the minimum national standards are attained by State enforcement of its own law. "[I]t is with an approved state law and with state regulations . . . that mine operators must comply." *Regulation Litig.*, 653 F.2d at 519; *see also* Background, Surface Coal Mining and Reclamation Operations Final Rule, 53 Fed. Reg. 26,728, 26,728 (July 24, 1988) (quoting *Regulation Litig.*).

In sum, even though the States ultimately remain subject to SMCRA, the Act grants "exclusive jurisdiction" to a primacy State (one with an approved program), thereby conditionally divesting the federal government of *direct* regulatory authority. *See Regulation Litig.*, 653 F.2d at 519; *see also* 30 U.S.C. § 1253(a) (requiring a would-be primacy State to demonstrate that it has "the capability of carrying out the provisions of this chapter"). Therefore, when a State's program has been approved by the Secretary of the Interior, we can look only to State law on matters involving the enforcement of the minimum national standards; whereas, on matters relating to the good standing of a State program, SMCRA remains directly applicable. *See Regulation Litig.*, 653 F.2d at 519 (observing that "judicial appeals of permit decisions are matters of State jurisdiction in which the Secretary plays no role"); *see also* 30

U.S.C. § 1276(e).

Bragg argues, however, that despite the federal government's conditional grant of "exclusive jurisdiction" to West Virginia, the national minimum standards set out in SMCRA retain operative force against West Virginia. For example, her complaint asserted that the State Director had violated nondiscretionary duties found in 30 U.S.C. § 1260, which sets out requirements for permit approval, and in § 1265, which establishes standards for reclaiming mined property and preserving the environment.

To construe SMCRA in the manner urged by Bragg, however, would circumvent the carefully designed balance that Congress established between the federal government and the States because the effect of a citizen suit to enjoin officials in a primacy State to comport with the *federal* provisions establishing the core standards for surface coal mining would end the exclusive State regulation and undermine the federalism established by the Act. Thus, rather than advancing the federal interest in preserving this statutory design, Bragg's interpretation would frustrate it.

While it is true that Congress' desire to implement minimum national standards for surface coal mining drives SMCRA, Congress did not pursue, although it could have, the *direct* regulation of surface coal mining as its preferred course to fulfill this desire. Nor did Congress invite the States to enforce federal law directly. By giving States exclusive regulatory control through enforcement of *their own* approved laws, Congress intended that the federal law establishing minimum national standards would "drop out" as operative law and that the State laws would become the sole operative law. *Cf. Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453, 464 n.1 (D.C. Cir. 1991) (Wald, J., concurring) (recognizing that the provisions of SMCRA do not "technically apply" in primacy States). Thus, all of the *federal* provisions establishing the minimum national

standards are not directly operative in West Virginia so long as it remains a primacy State. *Cf. Haydo v. Amerilkohl Mining, Inc.*, 830 F.2d 494, 498 (3d Cir. 1987) (noting that "SMCRA *itself* is not violated by an operator's violation of a permit condition" (emphasis added)). This is not to say, of course, that *all* of SMCRA's provisions "drop out." The Act's structural provisions creating the facility through which the State can attain and can lose its primacy status remain directly operative. *See, e.g.*, 30 U.S.C. §§ 1253, 1254, 1267, 1271. But these provisions are not at issue in this case. Bragg's complaint essentially challenges the Director's failure to follow the permitting requirements set forth in 30 U.S.C. § 1260 and the environmental protection performance standards set forth in § 1265, and only § 1260 claims remain in Counts 2 and 3.

Because 30 U.S.C. § 1260 establishes minimum standards that have been adopted by West Virginia and approved by the Secretary, *see* W. Va. Code § 22-3-18,[4] any violation of this standard involves State law, not federal law, even though the relevant language in the State law is identical to that in the federal law. Accordingly, any injunction against State officials

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[4]The Secretary has routinely interpreted 30 U.S.C. § 1260 as a minimum national standard or requirement that must be adopted by the States to achieve primacy status. Thus, the Secretary requires that a State counterpart to § 1260 be included in an approved State law. *See, e.g.*, Approval of Amendment to Utah Regulatory Program, 63 Fed. Reg. 63,608, 63,608-10 (Nov. 16, 1998); Approval of Amendment to W. Va. Regulatory Program, 61 Fed. Reg. 6511, 6515-16 (Feb. 21, 1996); Approval of Amendments to Ill. Regulatory Program, 55 Fed. Reg. 35,301, 35,303 (Aug. 29, 1990); Approval of Permanent Program Amendments from the State of Ala., 51 Fed. Reg. 29,098, 29,099 (Aug. 14, 1986); Conditional Approval of the Permanent Program Submission from the State of Ark., 45 Fed. Reg. 77,003, 77,015 (Nov. 21, 1980). In accordance with the Secretary's position, West Virginia enacted W. Va. Code § 22-3-18 to satisfy the requirements imposed by 30 U.S.C. § 1260.

to enforce this provision would command them to comport with the State's own law, not federal law, because only the State law is operative and directly regulates the issuance of permits.

In this case, the district court's injunction created two layers of indignity, as it not only directed the Director to make findings as required by the West Virginia Act, see W. Va. Code § 22-3-18, but in so doing, also ordered the Director to make findings required by the state-law buffer zone regulation, see W. Va. Code St. R. tit. 38 § 2-5.2. That federal command to a State official to comply with the State's law was so abhorrent to the values underlying our federal structure as to fall outside the bounds of the *Ex parte Young* exception. In *Pennhurst*, the Supreme Court stated:

> [I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment. We conclude that Young and Edelman are inapplicable in a suit against state officials on the basis of state law.

465 U.S. at 106. To be certain, the state-law claims at issue in *Pennhurst* were of a different character from the claims at issue in this case. In *Pennhurst*, the Supreme Court noted that because the lower court had exercised pendent jurisdiction over the state-law claims, *see id.* at 104, an *Ex parte Young* injunction to enforce those claims was not necessary to vindicate the supremacy of federal law, *see id.* at 106. In this case, the federal interest in adjudicating the dispute is undoubtedly stronger, as the rights at issue were created by the State pursuant to a federal invitation to implement a program that met certain minimum standards set by Congress. Moreover, the federal government, through the Secretary's oversight role,

retains an important modicum of control over the enforcement of that State law. *See* 30 U.S.C. §§ 1271, 1267; *Regulation Litig.*, 653 F.2d at 520.

Nonetheless, although "the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night," *Edelman*, 415 U.S. at 667, we conclude that the injunctive relief sought against the State Director in this case "falls on the Eleventh Amendment side of the line" by some distance, *Coeur d'Alene Tribe*, 521 U.S. at 281, and is therefore barred by the Eleventh Amendment. The *Pennhurst* Court made clear that its decision was driven by the indignity to which a State is subject when a federal court orders that State's officers to conform their conduct with their own laws -- a concern that is also present in this case. *See* 465 U.S. at 106. In subsequent Eleventh Amendment decisions, the States' dignity interest has played an increasingly critical role. *See, e.g., Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that states "retain the dignity, though not the full authority, of sovereignty"); *Coeur d'Alene Tribe*, 521 U.S. at 268 (stating that "immunity is designed to protect" the "dignity and respect afforded a State"); *see also S.C. State Ports Auth.*, 243 F.3d at 171 (noting that it was "the spectre of private suits against the states that mattered to the founders"). That dignity interest does not fade into oblivion merely because a State's law is enacted to comport with a federal invitation to regulate within certain parameters and with federal agency approval. *Cf. United States Dep't of Energy v. Ohio*, 503 U.S. 607, 625 (1992) (noting that state-law penalties approved by the Environmental Protection Agency and supplanting the Clean Water Act did not "arise under federal law" as meant in 28 U.S.C. § 1331). And particularly in the absence of an explicit incorporation of State law into federal law, *cf. Arkansas*, 503 U.S. at 110-11; *Geis v. Bd. of Educ.*, 774 F.2d 575, 581 (3d Cir. 1985), States retain a

unique interest in the enforcement of their own law against their own officers. This is especially true where, as here, Congress has reserved to the States the "exclusive" right to set the rules by which the regulation of surface mining will be governed. The West Virginia statute and implementing regulations are solely the product of its own sovereignty, enacted pursuant to its democratic processes, and, as was the case in *Pennhurst*, a State's sovereign dignity reserves to its own institutions the task of keeping its officers in line with that law.

Moreover, it is simply not the case that an *Ex parte Young* injunction is necessary to "vindicate the supreme authority of federal law" in this context. *Pennhurst*, 465 U.S. at 106. The SMCRA citizen-suit provision is designed not to vindicate individual rights, but rather to supplement the Secretary's enforcement power under 30 U.S.C. § 1271(b) -- a power that is unaffected by the constraints of the Eleventh Amendment. *See Seminole Tribe v. Florida*, 517 U.S. 44, 71 n.14 (1996) (citing *United States v. Texas*, 143 U.S. 621, 644-45 (1892)). If West Virginia's program no longer comports with the federal blue-print found in SMCRA, the Secretary may instigate an enforcement proceeding and revoke West Virginia's authority to regulate surface mining. Additionally, as part of its approved State program, West Virginia enacted a citizen suit provision that, parroting the language of its federal counterpart, gives affected individuals the right to sue in State court to compel the Director's compliance with the West Virginia Act. *See* W. Va. Code § 22-3-25. Because the West Virginia courts are open to such suits, the federal interest in maintaining the State's compliance with its own program may be fulfilled via suit in that forum, in a manner that does not offend the dignity of the State. *See Coeur d'Alene Tribe*, 521 U.S. at 274 (opinion of Kennedy, J.).

In sum, rather than asking the States to enforce the federal law, Congress through SMCRA invited the States to create their

own laws, which would be of "exclusive" force in the regulation of surface mining within their borders. *See Hodel*, 452 U.S. at 289 (noting that under SMCRA, states "enact and administer their own regulatory programs"). An order from an Article III court instructing an officer of such a State to conform his conduct with a duly enacted State law would create an affront to that State's dignity similar to that created by the orders at issue in *Pennhurst*. And particularly when that State's law specifically provides for its own enforcement in a State forum, the concerns that gave rise to the exception of *Ex parte Young* evaporate.

Accordingly, we conclude that Bragg's claims filed against the State Director in federal court are not authorized by the *Ex parte Young* exception to the Eleventh Amendment.

C

Alternatively, Bragg contends that West Virginia waived its sovereign immunity in federal court when it elected to submit its program to the Secretary for approval and thereby accepted the federal government's invitation to act as the regulator of surface coal mining in the State. She argues that in exchange for giving the State the right to regulate surface coal mining, "Congress required the states to agree to submit to federal jurisdiction under [30 U.S.C.] § 1270(a)(2) to review their non-discretionary actions for conformity with federal law" and therefore that the State "waived its immunity." We cannot agree.

"If Congress is not unmistakably clear and unequivocal in its intent to condition a gift or gratuity on a State's waiver of its sovereign immunity, we cannot presume that a State, by accepting Congress' proffer, knowingly and voluntarily assented to such a condition." *Bell Atl. Md.*, 240 F.3d at 292. Congress provided no "unequivocal" warning that States which

submit a program for approval by the Secretary thereby waive their immunity. To the contrary, the citizen-suit provision explicitly authorizes a compliance action "against . . . the appropriate State regulatory authority," but only "*to the extent permitted by the eleventh amendment to the Constitution.*" 30 U.S.C. § 1270(a)(2) (emphasis added). Far from expressing Congress' clear intent that participating States waive Eleventh Amendment immunity, this language actually preserves a State's sovereign immunity. *See Burnette v. Carothers*, 192 F.3d 52, 57 (2d Cir. 1999) (concluding that similar language in the Clean Water Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation and Liability Act did not evidence Congress' intent to abrogate state immunity). Accordingly, we reject Bragg's argument that West Virginia waived its sovereign immunity in federal court when it accepted Congress' invitation to assume "exclusive jurisdiction" over the regulation of surface mining within its borders.

IV

In their appeal, the intervening coal companies and coal associa- tions (collectively, "coal companies") contend that the district court lacked subject matter jurisdiction to enter the consent decree, dated February 17, 2000, which approved a settlement that disposed of a number of Bragg's claims against the Director. *See Bragg*, 83 F. Supp. 2d at 722. They base their challenge on two points. First, they argue that the suit at issue did not fall within the class of suits over which 30 U.S.C. § 1270(a)(2) provides jurisdiction. Noting that the statute creates a cause of action for the Director's failure to perform duties "which are not discretionary," the coal companies contend that the permitting decisions at issue in this case arose from purely discretionary duties. They also maintain that because the duties

at issue arose from the West Virginia statute and regulation,§ 1270(a)(2) is not pertinent because the duties sought to be enforced are not duties "under this chapter." Second, they argue that because Counts 2 and 3 were barred by the Eleventh Amendment, the counts settled by the consent decree were also barred. Even though Bragg and the Director voluntarily entered into the settlement agreement and submitted it to the district court for approval by a consent decree, the district court's power to enter the decree depended on its having subject matter jurisdiction over the case. *See, e.g., Local No. 93, Int'l Assoc. of Firefighters v. City of Cleveland,* 478 U.S. 501, 525 (1986). And, of course, a challenge to subject matter jurisdiction is appropriately raised at any point in the proceedings. *See, e.g., Clinton v. City of New York*, 524 U.S. 417, 428 (1998). Nevertheless, neither of the coal companies' jurisdictional arguments is truly a challenge to subject matter jurisdiction.

The coal companies' argument that the duties at issue were neither "nondiscretionary" nor "under this chapter," while possibly correct, nevertheless does not challenge the lower court's jurisdiction, but rather the merits of the settled claims. Jurisdiction is proper unless "the cause of action alleged is *so patently without merit* as to justify . . . the court's dismissal for want of jurisdiction." *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 70 (1978) (internal quotation marks and citations omitted) (alteration in original); *see also Steel Co. v. Citizens for Better Government*, 523 U.S. 83, 89 (1998) (same). It is now settled that 30 U.S.C.§ 1270 confers on federal district courts subject matter jurisdiction over at least some sorts of claims. *See Molinary v. Powell Mtn. Coal Co.* , 125 F.3d 231, 235-37 (4th Cir. 1997); *Regulation Litig.*, 653 F.2d at 519. And Bragg's complaint, which alleged that the duties at issue in the consent decree were "nondiscretionary" and "under this chapter," invoked the court's jurisdiction under § 1270. It may be the case, as the coal companies claim, that

further legal analysis would have revealed that the duties alleged were either "discretionary" or not "under this chapter." But that type of argument would be properly raised not in a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, but rather in a Rule 12(b)(6) motion to dismiss for failure to state a claim. *See Fogel v. Chestnutt*, 668 F.2d 100, 105-06 (2d Cir. 1981) (Friendly, J.) (discussing the tendency of courts to conflate these two concepts); 13 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 3522, at 78-79 (1984) (same); *see also Steel Co.*, 523 U.S. at 89 ("[T]he district court has jurisdiction if the right of the petitioners to recover under the complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another" (internal quotation marks and citation omitted)); *cf. City of Yonkers v. United States*, 320 U.S. 685, 695 (1944) (Frankfurter, J., dissenting) ("'Jurisdiction' competes with 'right' as one of the most deceptive of legal pitfalls"). As long as Bragg's claims were not clearly frivolous from the face of the complaint, jurisdiction was proper, and a challenge to the consent decree may not be made on a jurisdictional basis.[5]

The coal companies also contend that because Counts 2 and 3 were barred by the Eleventh Amendment, the district court's exercise of jurisdiction over the consent decree was also inappropriate. But the coal companies may not assert a defense

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[5]Moreover, even if subject-matter jurisdiction may be questioned under 30 U.S.C. § 1270(a)(2), Bragg has also invoked jurisdiction by asserting claims under the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, NEPA, 42 U.S.C. § 4321 et seq., the Administrative Procedure Act, 5 U.S.C. §§ 701-706, and the All Writs Act, 28 U.S.C. § 1651(a), and invoking 28 U.S.C. §§ 1331, 1361, 2201, and 2202. If her claim under SMCRA were actually one to enforce a State law claim, the district court would arguably still have jurisdiction over that claim under 28 U.S.C. § 1367(a).

on behalf of the Director that the Director chooses not to assert. Sovereign immunity, unlike the subject matter jurisdiction requirement, may be waived by the State, *see Coeur d'Alene Tribe*, 521 U.S. at 267, and it may be the case that when the Director entered into the consent decree and invoked the district court's jurisdiction over it, West Virginia waived its immunity with respect to the claims settled in that decree. *See Coll. Sav. Bank*, 527 U.S. at 675-76 (citing *Gunter v. Atl. Coast Line R.R.*, 200 U.S. 273, 284 (1906)). But, in any event, the Director has not asserted this defense to the consent decree. Because sovereign immunity reflects the federal courts' respect for the States, we need not undermine that respect by forcing a State to assert immunity when it chooses not to do so. *Cf. Wisc. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998) (stating that a court "can ignore" the issue of Eleventh Amendment immunity "[u]nless the State raises the matter"). In sum, we reject the coal companies' challenge to the settlement agreed to by the Director and the consent decree entered by the district court approving it.

V

For the reasons given, the consent decree of February 17, 2000, is affirmed, but the judgment of the district court enjoining the State Director is vacated, and the case is remanded to the district court with instructions to dismiss Bragg's unsettled claims asserted in Counts 2 and 3 without prejudice to any suit she may wish to pursue in West Virginia State court.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH INSTRUCTIONS.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA.

Patricia BRAGG, *et al.*,
Plaintiffs,

v.

Civil Action No. 2:98-0636
[Entered Oct. 9, 1998]

Dana ROBERTSON, Colonel,
District Engineer, United States
Army Corps of Engineers,
Huntington Division, *et al.*,
Defendants.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

Pending are (1) the Arch Coal subsidiaries' motion to dismiss Counts 1, 3, 4, 12 & 13; (2) the Arch Coal subsidiaries' motion to dismiss the claims of Patricia Bragg and injunctive relief claims which target individual permits or permit applications; and (3) Defendant Michael Miano's motion to dismiss.[1] The

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[1]Pending also are (1) motion to adopt all motions which are favorable to the West Virginia Mining and Reclamation Association and West Virginia Coal Association ("Associations"); (2) motion to exceed page limit for memoranda filed by the Arch Coal subsidiaries; and (3) motion to exceed page limit for memoranda filed by Plaintiffs. After careful consideration, the Court GRANTS each of these three motions.

Pending also is Plaintiffs' motion for leave to file a surreply. After careful consideration, the Court DENIES the motion.

The Court does not address Miano's argument the case must be dismissed for failure to join indispensable parties, which ground was withdrawn in his reply memorandum.

matters are ripe for review.

I. FACTUAL BACKGROUND

On July 16, 1998 Plaintiffs filed this civil action seeking declaratory and injunctive relief, as well as fees and costs, under the citizen suit provision of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), 30 U.S.C. § 1270(a). They named as Defendants Colonel Dana Robertson, District Engineer; Lieutenant Joe Ballard, Chief of Engineers and Commander; Michael Gheen, Chief of the Regulatory Branch, Operations and Readiness Division; and their employer, the United States Army Corps of Engineers. Plaintiffs also named as Defendant Michael Miano, Director of the West Virginia Division of Environmental Protection.

In Counts One through Ten, Plaintiffs sued Miano, alleging a pattern and practice of his violating mandatory non-discretionary duties under SMCRA and the West Virginia state regulatory program approved under that statute.

In Counts Eleven though Thirteen, Plaintiffs sued the United States Corps of Engineers ("the Corps," "Corps") officials, alleging a pattern and practice of failing to carry out their statutory duties under the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"), the Clean Water Act, 33 U.S.C. § 1344 ("CWA"), and the Administrative Procedure Act, 5 U.S.C. § 553, 706(2)(A) ("APA"). Plaintiffs allege it is beyond the Corps' jurisdiction under the CWA to regulate valley fills created for the disposal of waste material, or that the Corps has violated NEPA by issuing Nationwide Permits ("NWP") without the required analysis, and that it is unlawful for the Corps to issue NWPs 21 and/or 26 for surface mining valley fills in West Virginia.

II. DISCUSSION

A. Standard for Rule 12(b)(6) Motions

Our Court of Appeals has often stated the settled standard governing the disposition of a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure:

> In general, a motion to dismiss for failure to state a claim should not be granted unless it appears certain that the plaintiff can prove no set of facts which would support its claim and would entitle it to relief. In considering a motion to dismiss, the court should accept as true all well-pleaded allegations and should view the complaint in a light most favorable to the plaintiff.

Mylan Laboratories, Inc. v. Matkari, 7 F.3d 1130, 1134 (4th Cir.1993), *cert. denied*, 510 U.S. 1197 (1994) (citations omitted); *see also Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4th Cir. 1996); *Gardner v. E.I.Dupont De Nemours and Co.*, 939 F.Supp. 471, 475 (S.D.W.Va.1996).

It is through this analytical prism the Court evaluates Defendants' motion.

B. Eleventh Amendment

1. *Ex parte Young*

Defendant Miano argues all claims against him should be dismissed because he, as the official in a state agency, is immune from suit by virtue of the Eleventh Amendment. "The sovereign immunity embodied in the Eleventh Amendment protects an unconsenting state against suit brought by private parties in federal court." *CSX Trans., Inc. v. Bd. of Public*

Works, 138 F.3d 537, 539-40 (4th Cir.1998) (citing *Seminole Tribe v. Florida*, 517 U.S. 44, 52-54 (1996)), *petition for cert. filed*, 66 U.S.L.W. 3791 (U.S. June 8, 1998) (No. 97-1981).[2]

Here, the Court need only address the application of a well-established, narrow exception to the Eleventh Amendment, *Ex parte Young*. This doctrine is available when a plaintiff seeks prospective injunctive relief against a State official for continuing violations of federal law. The Supreme Court has indicated the exception applies only in situations in which Congress intended to authorize its availability because the cause of action has a limited remedial scheme. See Seminole Tribe, 517 U.S. at 73-76; *see also Lynn v. West*, 134 F.3d 582, 587-88 (4th Cir.1998), *petition for cert. filed*, 66 U.S.L.W. 3750 (U.S. May 11, 1998) (No. 97-1829) (applying the *Ex parte Young* exception).

Because Plaintiffs have sued Miano in his official capacity as a State official and seek only prospective, injunctive relief, the Court turns to whether Congress intended *Young* to be available for citizen suits under SMCRA. It is clear Congress intended SMCRA citizen suits to be available to the full extent of the Eleventh Amendment. The citizen suit provision states:

Except as provided in subsection (b) of this section,[3] any

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[2]Congress may abrogate the immunity "by a clear expression of legislative intent to abrogate enacted pursuant to a valid exercise of power." CSX Trans., Inc. v. Bd. of Public Works, 138 F.3d 537, 539-40 (4th Cir.1998), petition for cert. filed, 66 U.S.L.W. 3791 (U.S. June 8, 1998) (No. 97-1981). After the Supreme Court's decision in Seminole Tribe, an abrogation is effective only if it is based upon Congress' power in Section Five of the Fourteenth Amendment. Id. This principle does not affect the Court's decision in this matter, which turns on a well- established exception to the Eleventh Amendment immunity and construction of the SMCRA statute itself.

[3]30 U.S.C. § 1270(b) has no application to this discussion.

person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this chapter--

(2) against the Secretary or the appropriate State regulatory authority to the extent permitted by the eleventh amendment to the Constitution....

30 U.S.C.A. § 1270(a) (West 1998). Congress intended SMCRA to "assure ... public participation in the ... enforcement of regulations, standards, reclamation plans, or programs established by the Secretary or any State under this Act." *Id.* § 1202(i). Similarly, "citizen involvement in all phases of the regulatory scheme will help insure that the decisions and actions of the regulatory authority are grounded upon complete and full information ." H.R.Rep. No. 95-218, 95th Cong., 1st sess. 88-89, *reprinted in* 1977 U.S.C.C.A.N. 593, 625.

Based on the inclusion of the citizen suit provision as an integral part of a statute with a limited remedial scheme,[4] it is reasonable to conclude Congress implicitly authorized citizens to bring suit under the *Ex parte Young* exception. Natural Resources Defense Council v. Cal. Dep't of Transp., 96 F.3d

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[4]Miano argues in his reply brief that Congress provided a detailed remedial scheme, comparable to that in Seminole Tribe, such that the Ex parte Young exception does not apply. The remedial scheme to which he refers is that created in the regulations giving OSM the authority to evaluate WVDEP's administration of SMCRA and to take steps to withdraw approval of a state program for serious failure and inability to administer the program properly. As an initial matter, the Court notes Seminole Tribe referred particularly to a "detailed remedial scheme for the enforcement against a State of a statutorily created right" rather than simply a remedial scheme of any type. After careful consideration, the Court finds the process through which OSM may exercise oversight over WVDEP is not the type of detailed remedial scheme which suspends the Court's ability to hear the case.

420, 423-24 (9th Cir.1996) (post-*Seminole Tribe*; Clean Water Act); *see also Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1482-83 (10th Cir.1995) (pre-*Seminole Tribe*; SMCRA). Accordingly, Miano's motion to dismiss is DENIED on this ground.

2. Alleged Violations of Federal Law

Miano next argues Plaintiffs allege violations of state law by a State official, which claim is barred by the Eleventh Amendment. *See Martin Sales & Processing, Inc. v. W. Va. Dep't of Energy*, 815 F.Supp. 940, 943 n. 1 (S.D.W.Va.1993). Miano contends his mandatory non-discretionary duties are based entirely in state law, *i.e.*, the WVSMCRA and its state regulations.

Miano's argument focuses on only one portion of the entire regulatory scheme. Plaintiffs seek to enforce Miano's "failure ... to perform any act or duty *under this chapter* which is not discretionary ... with the appropriate State regulatory authority." 30 U.S.C. 1270(a)(2) (emphasis added). Miano correctly recognizes the specific duties that Plaintiffs allege are being violated appear in the WVSMCRA and state regulations. The language and structure of the SMCRA demonstrate, however, that these duties under an approved State program, such as West Virginia's, are incorporated into federal law.

The federal SMCRA created "a program of cooperative federalism that allows States, *within limits established by federal minimum standards*, to enact and administer their own regulatory program" which "mandat[es] compliance with the full panoply of federal performance standards, with enforcement responsibility lying with either the State or Federal Government." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 268-69 (1981) (emphasis added). Under "cooperative federalism," a state may become the "State

regulatory authority," which is the agency with the "primary responsibility at the State level *for administering this chapter*." 30 U.S.C. § 1253, 1291(26) (emphasis added). All parties agree WVDEP has become such a State regulatory authority, and Miano, as its director, is responsible for administering the SMCRA in West Virginia.

As a part of this administration and enforcement plan, federal law incorporates all provisions of an approved State program. See 30 C.F.R. §§ 733.11 (1997) ("States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act, this chapter and the provisions of the approved State program."), 900.11-12 (stating that upon approval of the State regulatory program, the program is "codified" in a Part of the Code of Federal Regulations reserved for that state). The Supreme Court has recognized a similar incorporation feature. *See Arkansas v. Oklahoma*, 503 U.S. 91, 110 (1992) (Clean Water Act) ("This regulation effectively incorporates into federal law those state-law standards the Agency reasonably determines to be 'applicable.' In such a situation, then, state water quality standards--promulgated by the States with substantial guidance from the EPA and approved by the Agency--are part of the federal law of water pollution control.") *See also Molinary v. Powell Mountain Coal Co., Inc.*, 125 F.3d 231, 234-37 (4th Cir.1997) (upholding OSM's construction that state- promulgated regulations comprising a federally-approved State program under SMCRA are "issued pursuant to" SMCRA and can be the basis for a citizen suit filed under SMCRA), *cert. denied*, --- U.S. ---, 118 S.Ct. 1056 (1998).[5] Taking into account the entire SMCRA

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[5]Miano argues *Molinary* is not applicable because it construed Section 1270(f) rather than Section 1270(a). Although the Molinary claim was brought under Section 1270(f), the Fourth Circuit's discussion specifically harmonizes Section 1270(f) with Section 1270(a)(1), 125 F.3d at 236, and

format, Plaintiffs properly allege violations of federal law, which allegations do not offend the Eleventh Amendment. Accordingly, the Court DENIES Miano's motion to dismiss on this ground.

C. Exhaustion of State Remedies

The Supreme Court has outlined the analysis to be used in determining whether Plaintiffs must exhaust administrative remedies:

> The doctrine of exhaustion of administrative remedies is one among related doctrines ... that govern the timing of federal court decisionmaking. Of "paramount importance" to any exhaustion inquiry is congressional intent. Where Congress specifically mandates, exhaustion is required. But where Congress has not clearly required exhaustion, sound judicial discretion governs.... Nevertheless even in this field of judicial discretion, appropriate deference to Congress' power to prescribe the basic procedural scheme under which a claim may be heard in federal court requires fashioning of exhaustion principles in a manner consistent with congressional intent and any applicable statutory scheme.
> This Court has long acknowledged the general rule that parties exhaust prescribed administrative remedies before seeking relief from the federal courts. Exhaustion is required because it serves the twin purposes of protecting administrative agency authority and promoting judicial efficiency.

McCarthy v. Madigan, 503 U.S. 140, 144-45 (1992). *See also*

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would similarly support the Court's construction of Section 1270(a)(2).

Volvo GM Heavy Truck Corp. v. United States Department of Labor, 118 F.3d 205, 208-09 (4th Cir.1997) (reviewing *McCarthy* and *Darby v. Cisneros*, 509 U.S. 137 (1993)); *Barnes v. Int'l Amateur Athletic Fed.*, 862 F.Supp. 1537, 1542-43 (S.D.W.Va.1993) (Copenhaver, J.) (reviewing *McCarthy*). Administrative review allows an agency to correct its own mistakes, avoids unnecessary encumbrances of limited judicial resources, and prevents piecemeal litigation. *McCarthy*, 503 U.S. at 145. "'In determining whether exhaustion is required, federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion.'" *Volvo*, 118 F.3d at 209 (quoting *McCarthy*, 503 U.S. at 146) (citing also *Bowen v. City of New York*, 476 U.S. 467, 484, 106 S.Ct. 2022, 2032, 90 L.Ed.2d 462 (1986) ("application of exhaustion doctrine is 'intensely practical'.... The ultimate decision of whether to waive exhaustion ... should be guided by the policies underlying the exhaustion requirement.")).

Miano and the Arch Coal subsidiaries each argue the suit must be dismissed because Plaintiffs failed to exhaust their state remedies. Both arguments turn on the application of Section 1276(e), which states:

> Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 1270 of this title except as provided therein.

30 U.S.C.A. § 1276. Section 1270,[6] the citizen suit provision

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[6]Section 1270 states in relevant part:

under which Plaintiffs proceed, requires written notice of the violation be given sixty days before the complaint is filed.

In Section 1276(e), Congress has not specifically mandated exhaustion of administrative remedies for citizen suits.[7] Instead, the provision explicitly states the availability of administrative remedies "shall not be construed to limit the operation" of the citizen suit provision. The only fair construction of this language is that it carves out an exception to the normal exhaustion requirement.[8]

(b) Limitation on bringing of action.
No action may be commenced--

(1) under subsection (a)(1) of this section--

(A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this chapter, or any rule, regulation, order, or permit issued pursuant to this chapter, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

[7]The Court restricts its inquiry to whether an exhaustion requirement applies to a citizen suit and does not address other suits arising under SMCRA. *See Mullins Coal Co. v. Clark*, 759 F.2d 1142, 1146 (4th Cir.1985) (noting exhaustion is generally required in SMCRA suits but not discussing citizen suits).

[8]The Arch Coal subsidiaries argue "a plain reading" of the language suggests only that the availability of judicial review does not preempt a citizen suit in federal court. Reply of Permittee Intervenors Supp. Mot. to Dismiss Claims of Patricia Bragg at 3 (citing Robert E. Beck, *The Current*

Because Congress has not specifically mandated exhaustion, the question lies within the sound discretion of the Court. In exercising its discretion, the Court must consider congressional intent and the basic statutory scheme at issue. Weighing these elements, as well as consideration for allegations of a pattern and practice of violations, the Court holds Plaintiffs need not exhaust administrative remedies before pursuing this civil action.

Besides noting the only fair construction of the statutory language at issue, *see supra*, the Court recognizes Congress provided the citizen suit vehicle in addition to the more traditional judicial review of agency action. Congress provided this remedy not simply to offer affected citizens a vehicle for relief, but also to supplement regulation by government agencies that have limited budgets, with regulation by those with a significant incentive to regulate, the affected citizens. *See* H.R.Rep. No. 95-218, 95th Cong., 1st Sess. 88-89, *reprinted in* 1977 U.S.C.C.A .N. 593, 625 ("The success or failure of a national coal surface mining regulation program will depend, to a significant extent, on the role played by citizens in the regulatory process. The State or Department of Interior can employ only so many inspectors, only a limited number of inspections can be made on a regular basis and only a limited amount of information can be required in a permit or bond release application or elicited at a hearing.... While citizen participation is not, and cannot be, a substitute for governmental authority, citizen involvement in all phases of the regulatory scheme will help insure that the decisions and

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Effort in Congress to Amend the Surface Mining Control and Reclamation Act of 1977), 8 Fordham Envtl. L.J. 607, 623 (1997)). Notably, the subsidiaries offer only a few vague, conclusory paragraphs from the Beck article to support the argument. The Court finds no compelling basis for the proposition.

actions of the regulatory authority are grounded upon complete and full information.").

Furthermore, the Court finds the congressional intent expressed in legislative history does not contradict the only fair construction of Section 1276(e)'s language. As is to be expected when parsing congressional intent, each side argues the legislative history supports its argument. After careful consideration, the Court finds Congress did not intend to require exhaustion of administrative review before citizen suits could be filed.

First, Congress rejected a substitute bill that removed the Section 1276(e) language. As Plaintiffs illuminate, several congressmen and the Department of the Interior disagreed with the citizen suit provision in the 1974 bill, which is substantially similar to the enacted language. *See* H.R.Rep. No. 93-1072, 93rd Cong., 2d Sess. 28, Ex. 1, Pls.' Resp. to Miano's Mot. Dismiss; *id.* at 224 (dissenting committee members' objection that citizen suit is available "on top of the judicial review provisions" and "in addition to all other existing remedies"). The dissenting congressmen failed in their attempt to pass a substitute bill that would have eliminated the language of Section 1276(e). *See id.* at 199-239; 120 Cong. Rec. 24080-81 (July 17, 1974).

Second, Congress specifically amended language in Section 1270 to prevent collateral attacks on the permit filed against the operator, but did not prohibit such attacks filed against a governing agency. *See* H.R.Rep. No. 95-218 at 67 (1977), *reprinted in* 1977 U.S.C.C.A.N. 593, 606; Ex. 1, Arch Coal subsidiaries' Reply to Mot. Dismiss Braggs' Claims. Comparing the earlier language to the enacted language reveals Congress' clear intent, expressed in the House Report to H.R. 2, *id.*, to prevent collateral permit attacks filed against operators. What can be inferred, therefore, is that Congress contemplated and did not object to collateral attacks on permits

filed against a governing agency, as is done here.

Finally, the Court recognizes that, contrary to Defendants' characterizations, Plaintiffs are not challenging one or more particular permits or permit applications. Instead, Plaintiffs allege agencies have engaged in a pattern and practice of violations. If Plaintiffs were required to challenge each permit or permit application through the appropriate avenues of administrative review, such an allegation would be extremely difficult, if not impossible, to bring to the attention of the Courts. This result would impermissibly burden the right of action Congress has provided to aggrieved citizens.

Accordingly, the Court holds Plaintiffs need not exhaust administrative remedies before filing a citizen suit complaint alleging agencies have engaged in a pattern and practice of violations. Accordingly, the Court DENIES Miano's and the Arch Coal subsidiaries' motions to dismiss on this ground.

D. Lack of Jurisdiction to Challenge Existing Permit Applications

The Arch Coal subsidiaries argue the Court lacks jurisdiction over those claims which seek injunctive relief with respect to existing surface permit applications. Specifically, Plaintiffs seek an order directing Miano "to withhold approval of permit applications for surface coal mining and reclamation operations that include proposed valley fills in waters of the United States and the State unless and until" nine events occur. Complaint at 45-47 ¶ L. The subsidiaries argue Plaintiffs impermissibly seek this relief with respect to any permits WVDEP considers ready to issue because Plaintiffs have adequate administrative remedies for objecting to particular permit decisions, which they have not exhausted. Plaintiffs did not respond.

After careful consideration, the Court finds it could issue

such relief at least as to future permit applications.[9] Accordingly, the Court DENIES the Arch Coal subsidiaries' motion to dismiss as it relates to future permit applications.

E. Plaintiff Bragg

The Arch Coal subsidiaries challenge Plaintiff Bragg's standing to sue because she alleges injuries by permits already issued, but she seeks only declaratory and injunctive relief. Plaintiffs argue standing need not be established for every plaintiff so long as one properly has standing and Bragg has alleged sufficient facts for standing. Our Court of Appeals has recently restated the analysis for a challenge to a plaintiff's standing:

> The Constitution provides that "[t]he judicial Power" of the federal courts of the United States extends only to specified "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1; *see In re Pruett*, 133 F.3d 275, 278 (4th Cir.1997). "The doctrine of standing has always been an essential component of [the] case or controversy requirement of federal jurisdiction." *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir.1997). In order to have standing, a plaintiff must have suffered an actual or threatened injury in fact; the injury must have been caused by the defendant's complained-of conduct; and the injury must be redressable by the relief sought. *See Steel Co. v. Citizens for a Better Env't*, --- U.S. ----, ----------, 118 S.Ct. 1003, 1016-17, 140 L.Ed.2d 210 (1998). Moreover,

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[9]The more difficult question is whether such injunction could apply to pending permit applications, a question Plaintiffs have not addressed. Because the Court's inherent equitable powers allow it to issue an injunction, at least as to future applications, the Court withholds decision at this time as to pending applications.

> these elements must continue to exist at every stage of review, not merely at the time of the filing of the complaint. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 117 S.Ct. 1055, 1068, 137 L.Ed.2d 170 (1997); *Suarez Corp. Indus. v. McGraw*, 125 F.3d 222, 228 (4th Cir.1997).... The continued presence of these elements ensures that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962).

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 149 F.3d 303, 306 (4th Cir.1998).

Here, Bragg alleges she owns and lives in a home on Nighway Branch in Mingo County, West Virginia. She uses Nighway Branch, a perennial stream, for recreational and domestic purposes. Bragg alleges the stream will be disturbed by valleys fills associated with two permits that have already been issued.

The subsidiaries argue the Complaint does not request any relief with respect to either of these two permits nor claim she will suffer harm by any other action of the Defendants. Plaintiffs seek injunctive relief for a pattern and practice of violations that, Plaintiffs contend, survives a standing challenge based on redressability. In *Steel Co.*, the Supreme Court addressed the situation in which plaintiffs seek injunctive relief for past harms, stating:

> The latter objective [deterring defendant from future violations] can of course be "remedial" for Article III purposes, when threatened injury is one of the gravamens of the complaint. If respondent had alleged a continuing violation or the imminence of a future violation, the injunctive relief requested would remedy that alleged harm.

> But there is no such allegation here--and on the facts of the case, there seems no basis for it. Nothing supports the requested injunctive relief except respondent's generalized interest in deterrence, which is insufficient for purposes of Article III. *See Los Angeles v. Lyons*, 461 U.S., at 111, 103 S.Ct., at 1670.

Steel Co., 523 U.S. at ---, 118 S.Ct. at 1019. Here, Plaintiffs have stated a continuing violation that, under *Steel Co.*, is sufficient to satisfy the redressability requirement. Accordingly, the Court DENIES the Arch Coal subsidiaries' motion on this ground.[10]

F. Statute of Limitations

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[10]Alternatively, the Court notes substantial Supreme Court precedent that a court need not address questions of standing regarding one plaintiff so long as standing exists for other plaintiffs. *See, e.g., Secretary of Interior v. California*, 464 U.S. 312, 318 n. 3 (1984); *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 160 (1981); *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 299 n. 11 (1979); *Baldwin v. Fish & Game Comm'n. of Montana*, 436 U.S. 371, 377 n. 14 (1978); *Scott v. U.S.*, 436 U.S. 128, 135 n. 10 (1978); *Carey v. Population Services International*, 431 U.S. 678, 682 (1977); *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 263-64 & n. 9 (1977); *Planned Parenthood v. Danforth*, 428 U.S. 52, 62-63 & n. 2 (1976); *Doe v. Bolton*, 410 U.S. 179, 189 (1973); *Westchester Women's Health Organization v. Whalen*, 475 F.Supp. 734, 737 (S.D.N.Y.1979).

The subsidiaries do not challenge the standing of any other plaintiff, but argue the costs and attorneys fees sought in this case require the Court to address the standing of any challenged plaintiff. See Women's Med. Center v. Roberts, 512 F.Supp. 316, 319 (D.R.I.1981). In the absence of controlling precedent otherwise, the Court holds the prohibition against unnecessarily reaching constitutional issues prevents the Court from addressing Bragg's standing.

The Arch Coal subsidiaries argue Count 13 is barred by the statute of limitations because in order to succeed, Plaintiffs must challenge the EPA's 1988 Policy, which is an interpretative rule. Such challenges, they argue, must be asserted within six years of the rule's issuance. In turn, Plaintiffs argue the Count does not depend upon a challenge to the EPA policy. As an initial matter, the Court notes that Count 13 does not state a facial challenge to the EPA's 1988 Policy. Thus, even if Count 13 involves a substantive challenge to the 1988 Policy, the six-year term would not begin to accrue on the regulation's issuance, but when the regulation was applied to the challenger. *Florida Keys Citizen Coalition v. West*, 996 F.Supp. 1254, 1256 (S.D.Fla.1998); *Dunn-McCampbell Royalty v. Nat'l Park Service*, 112 F.3d 1283, 1287 (5th Cir.1997). To determine when the statute of limitations commenced to run, the Court must resolve a factual issue, which is not ripe for disposition at this time. Accordingly, the Court DENIES the subsidiaries' motion on this ground.

G. Arguments Regarding Counts 1, 3, 4 and 12

The Arch Coal subsidiaries raise various arguments that Counts 1, 3, 4 and 12 cannot be maintained under the state of the law. After careful consideration, the Court DENIES the Arch Coal subsidiaries' motion on these grounds.

III. CONCLUSION

Accordingly, the Court GRANTS the Associations' motion to adopt all favorable motions; GRANTS Arch Coal subsidiaries' motion to exceed page limit; GRANTS Plaintiffs' motion to exceed page limit; DENIES Plaintiffs' motion for leave to file surreply; DENIES the Arch Coal subsidiaries' motion to dismiss Counts 1, 3, 4, 12 and 13; DENIES the

subsidiaries' motion to dismiss the claims of Patricia Bragg and injunctive relief claims which target individual permits or permit applications; and DENIES Defendant Miano's motion to dismiss.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to all counsel of record.

ENTER: October 8, 1998

/s/
Charles H. Haden II, Chief Judge

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA

Patricia BRAGG, *et al.*,
Plaintiffs,

v.

Civil Action No. 2:98-0636
[Entered Oct. 20, 1999]

Colonel Dana ROBERTSON,
et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

HADEN, Chief Judge.

Pending are cross-motions for summary judgment on Counts 2 and 3 of the Second Amended Complaint.[1] For reasons discussed more fully below, the Court GRANTS Plaintiffs' motion and DENIES Defendants' motion.

I. PROCEDURAL AND FACTUAL BACKGROUND

These motions address a relatively small, but critical portion of an extended civil action concerning the form of surface coal mining commonly known as "mountaintop removal" mining.

Following extensive hearings on a proposed surface mining permit for the Hobet Spruce Fork mine, which the Court

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[1]A joint motion for summary judgment was filed by Defendant Director of the West Virginia Department of Environmental Protection ("DEP"), and Defendant-Intervenors the Arch subsidiaries, the coal associations, the land companies, and the United Mine Workers of America.

considered as an instance of the Plaintiffs' pattern and practice claims, the Court enjoined the federal Defendants[2] from issuing any further permits for that mine, stayed permits issued by the DEP Director, and enjoined the Arch subsidiaries from preconstruction or mining activities for the Spruce Fork operation until the case was resolved on the merits. *Bragg v. Robertson*, 54 F.Supp.2d 635 (S.D.W.Va.1999). By Order of June 17, 1999 the Court accepted a settlement agreement which resolved Counts 11, 12, and 13 of the Amended Complaint concerning the Federal Defendants, although the Court retained jurisdiction to interpret and enforce the agreement until fully performed. *Bragg v. Robertson*, 54 F.Supp.2d 653 (S.D.W.Va.1999).

On July 26, 1999 a proposed consent decree, which purports to resolve all remaining issues with the exception of Counts 2 and 3, was presented to the Court. The consent decree was signed by Plaintiffs' counsel and Michael Miano, then Director of the DEP,[3] but the Director represented to the Court that West Virginia Code Section 5-3-2a requires public notice and comment before the agency may ask the Court to enter the decree. Additionally, the Court established its own period for public comment on the consent decree to end September 30, 1999. Accordingly, the motion to enter the consent decree remains pending.

All parties concede they cannot reach a settlement on the

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[2]The Federal Defendants were Dana Robertson, Colonel, District Engineer; Joe N. Ballard, Lieutenant General, Chief of Engineers and Commander; and Michael D. Gheen, Chief of the Regulatory Branch, Operations and Readiness Division, all of the United States Army Corps of Engineers.

[3]Miano has since been succeeded by Michael Castle as DEP Director. Hereafter the Defendant Director of the DEP will be identified as "the Director" or "DEP Director."

remaining counts, Counts 2 and 3, and that these counts are appropriate for summary judgment. The parties' opposing motions are now ripe for disposition.

A. Mountaintop Removal Mining

The coalfields of southern West Virginia are mountainous, with steep wooded slopes. Coal in these mountains is found in seams of varying thickness sandwiched between layers of rock and dirt. In mountaintop removal mining,[4] the rock and dirt overburden or "spoil" is removed, layer by layer, and the coal is mined at the exposed surface, as it appears. The ultimate effect is to remove the mountaintop to a depth where deep mining is the practical method of recovery.

The Surface Mining Control and Reclamation Act of 1977 ("SMCRA"), Pub.L. 95-87 (1977) (codified at 30 U.S.C. §§ 1201-1328), provides general performance standards, which require coal mining operations "as [sic] a minimum" to "restore the approximate original contour of the land."[5] 30 U.S.C. § 1265(b)(3). Where the volume of overburden is large relative to the amount of coal removed, and where that volume is increased due to the "swell factor" associated with earth removal, not all the earth and rock removed during mining is needed to restore AOC. The unneeded overburden is called "excess spoil."

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[4]"Mountaintop removal mining means surface mining activities, where the mining operation removes an entire coal seam or seams running through the upper fraction of a mountain, ridge or hill ... by removing substantially all of the overburden off the bench and creating a level plateau or gently rolling contour, with no highwalls remaining[.]" 30 C.F.R. § 785.14 (1998).

[5]Waivers to approximate original contour ("AOC") requirements are available, generally when land will be put to "an equal or better economic or public use." 30 U.S.C. § 1265(e)(3)(A); *see also* 30 C.F.R. § 824.11.

Valley fills are composed of excess spoil, that is coal mine waste material,[6] which is disposed of by placing it in a valley. The topography of the coalfields and gravity dictate that valleys contain streams, so that valley fills also are generally placed in streams and streambeds.

B. Counts 2 and 3: The Buffer Zone Rule

Counts 2 and 3 are superficially simple. Both involve the so-called "buffer zone rule," a SMCRA rule which provides:

> No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will 1) not adversely affect the normal flow or 2) gradient of the stream, 3) adversely affect fish migration or 4) related environmental values, 5) materially damage the water quantity or 6) quality of the stream and 7) will not cause or contribute to violations of applicable State or Federal water quality standards.

W.Va.Code St.R. ("C.S.R.") title 38 § 2-5.2 (numerals added); *see also* 30 C.F.R. § 816.57.

Count 2 of the Second Amended Complaint alleges the Director engaged in a pattern and practice of approving buffer zone variances based on permit applications that did not include findings required before such variances may be approved.

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[6] "Valley fills are constructed from and used to dispose of the spoil or coal mine waste material generated during mining operations." *West Virginia Coal Assoc. v. Reilly*, 728 F. Supp. 1276, 1280 (S.D.W.Va.1989) (Copenhaver, J.), *aff'd*, 932 F.2d 964, 1991 WL 75217 (4th Cir. 1991) (unpublished).

Count 3 alleges the Director's authority under this rule does not (or cannot) extend to permitting activities, in particular, valley fills, that bury substantial portions of intermittent and perennial streams.

The facts essential to resolution of these summary judgment motions are undisputed. The Director and his agents consistently admit that he made none of the required findings, one through six, for buffer zone variances when authorizing valley fills.[7] At the preliminary injunction hearing, permit reviewers testified, for example:

> If the company has shown that the fill is necessary during the review of the application with the spoil balance and stuff and they show that the fill will be stable, then ... in the area of the fill, we do not require them to make those [buffer zone variance] findings.

(Tr. of Prelim. Inj. Hr'g ("PI") at 133 (testimony of permit supervisor Larry Alt); *accord, id.*at 584 (Berthold K. Stollings testifying the buffer zone requirement is not applied to the segment of a stream filled by a valley fill).)

Surface mine permit applications support the agency testimony that the required findings were not made. A typical application relates:

> The normal flow and gradient of the stream will be adversely affected in the areas of the proposed durable rock [valley] fills and the required sediment control for each. Surface mining activities as proposed in this application make disturbance in these areas necessary.

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[7]The Director claims finding number seven is made when a Section 401 approval is given prior to a Section 404 permit issuing. See water quality discussion *infra*, at II.D.2.b.

...

> Fish migration and related environmental values will be adversely affected in the areas of the proposed durable rock [valley] fills and the required sediment control for each. Surface mining activities as proposed in this application make disturbance in these areas necessary.

(Surface Mine Permit Application S-5021-97; Pls.' Mem. in Supp. Pls.' Mot. Summ. J. ("Pls.' Mem"), Ex. 2). Based on applicant assertions that contend the buffer zone requirements could not be met, buffer zone variances, without required findings, were granted for numerous valley fills.

Further, Defendants have never denied that the stream segments buried under a valley fill no longer exist. Because the streams no longer exist, Defendants agree the required findings about stream flow, environmental values and water quantity and quality cannot be made. (*See, e.g.*, Alt testimony, PI at 159.) Instead, Defendants offer legal arguments and interpretations of the buffer zone rule, which, they propose, allow them to authorize valley fills in intermittent and perennial streams.

Defendants initially argue that the buffer zone rule does not apply to the segment of the stream filled, the "footprint" of the valley fill, but only to stream portions below the valley fill.[8]

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[8]This argument may be mooted by Defendants' ultimate change of position in the recent briefings and in the August Memorandum of Understanding, that "the buffer zone rule does apply to the footprint of fills." (Defs.' Reply at 11.)

Throughout the course of this litigation until August 1999, Defendants maintained the footprint of the valley fill was exempt from the stream buffer zone requirements. For example, in the Answer to the Second Amended Complaint, filed July 6, 1999, the Director "specifically denies that the buffer zone rule bans valley fills, or applies to the footprint of an approved fill." (Answer to Second Am. Compl. ¶ 73.)

As noted above, Defendants now propose, in their reply brief filed

Next, Defendants propose that when the buffer zone rule is read in conjunction, and harmonized, with other SMCRA regulations, valley fills are not precluded by the buffer zone rule.

Finally, Defendants advance that in August 1999 the DEP, United States Environmental Protection Agency ("EPA"), Office of Surface Mining ("OSM"), and the United States Army Corps of Engineers ("Corps") entered into a Memorandum of Understanding ("MOU").[9] The August 99 MOU allows 1) that valley fills may be constructed in intermittent and perennial streams and 2) that the findings for the buffer zone authorization are to be met through compliance with the ostensibly comparable Clean Water Act ("CWA") requirements necessary to carry out dredge and fill activities under CWA § 404. According to Defendants, therefore, Count 2 is now moot because the Director will be making the new findings. Defendants argue they are entitled to summary judgment on Count 3 because CWA § 404 permits fill operations and, thus, the Director is not precluded from authorizing valley fills in intermittent and perennial streams under the MOU interpretation.

August 30, 1999 and in the August MOU, that the buffer zone rule does apply to the footprint of valley fills.

Because both positions are presented and argued in Defendants' briefing on the summary judgment motions at hand, the Court addresses each argument in turn, without regard to whether Defendants now claim to have embraced or renounced the position, and without undue concern for the internal consistency of Defendants' arguments.

[9]The MOU is entitled "For the Purpose of Clarifying the Application of Regulations Related to Stream Buffer Zones Under the Surface Mining Control and Reclamation Act for Surface Coal Mining Operations that Result in Valley Fills."

II. DISCUSSION

A. Jurisdiction

1. 11th Amendment and Sovereign Immunity

As a West Virginia state official, the DEP Director raises a sovereign immunity defense under the Eleventh Amendment to the United States Constitution.

The Eleventh Amendment limits federal court jurisdiction:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign state.

Since 1890, the amendment has been interpreted also to prohibit suits against a state by its own citizens. *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890).

Following a series of recent Supreme Court cases, the Eleventh Amendment currently is construed to prohibit private actions against states in federal or state[10] court except 1) where the state consents, 2) to the extent authorized under Section five of the Fourteenth Amendment,[11] or 3) where the action is

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[10] *Alden v. Maine*, 527 U.S. 706, 119 S.Ct. 2240, 144 L.Ed.2d 636 (1999) (holding Congress's Article I powers do not extend to abrogation of nonconsenting state's sovereign immunity to private suits on federal claims in state courts).

[11] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996) (holding Congress lacks power under Article I (Commerce Clause) to abrogate states' sovereign immunity from suits commenced or prosecuted in the federal courts; however, 14th Amendment, section five powers do allow such abrogation).

asserted against a state officer for prospective declaratory and injunctive relief under *Ex parte Young*. *See* Erwin Chemerinsky, *Federal Jurisdiction* § 7.4 (1994). This action is a citizen suit against the West Virginia DEP Director, a state officer, for prospective declaratory and injunctive relief.

The Court previously determined it had jurisdiction over the Director under the *Ex parte Young* doctrine. *See Bragg v. Robertson*, 183 F.R.D. 494, 496-97 (S.D.W.Va.1998). Ever mindful of the need to assure its jurisdiction, and considering the Supreme Court's extensive attention to the Eleventh Amendment in the past year, the Court, *sua sponte*, invited the parties to brief sovereign immunity in light of current case law.

Having reviewed the parties' submissions, the Court is satisfied no issues have been raised that suggest the Court does not continue to enjoy jurisdiction under *Ex parte Young*.[12] The *Ex parte Young* doctrine is an exception to the Eleventh

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[12]Defendants declare, but do not argue, that the presence of a state court forum is dispositive against *Ex parte Young* jurisdiction for federal courts. (Defs.' Joint Mem. in Supp. Summ. J. ("Defs.' Mem.") at 18.) When Justices Rehnquist and Kennedy proposed this principle, it was soundly rejected by the remainder of the Court. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S.Ct. 2028, 138 L.Ed.2d 438 (1997). Justice O'Connor, joined by Scalia and Thomas in concurrence, notes, "[T]he principal opinion cites not a single case in which the Court expressly relied on the absence of an available state forum as a rationale for applying Young." *Id.* at 291, 117 S.Ct. 2028. O'Connor continues with a ringing defense of *Ex parte Young*: "We have frequently acknowledged the importance of having federal courts open to enforce and interpret federal rights.... [T]he availability of prospective relief of the sort awarded in *Ex parte Young* gives life to the Supremacy Clause.... [T]he *Young* doctrine has been accepted as necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Id.* at 293, 117 S.Ct. 2028 (citations and quotation marks omitted). The Court, therefore, believes the *Ex parte Young* exception provides jurisdiction over this civil action.

Amendment bar to private suits against States, a bar which is separate and distinct from the abrogation doctrine on which Defendants rely. Accordingly, the Court finds and concludes it has jurisdiction under *Ex parte Young* of this civil action against the DEP Director, a state official, to consider awarding prospective injunctive and declaratory relief from an pattern and practice of federal law violations under SMCRA.

B. SMCRA and Buffer Zone Regulations

SMCRA's first enumerated purpose is "establish[ing] a nationwide program to protect society and the environment from the adverse effects of surface coal mining operations." 30 U.S.C. § 1202(a). SMCRA contemplates "a continuing partnership between the states and the federal government, with the Secretary [of the Interior] providing oversight, advice, and backup authority, and the states bearing the major responsibility for implementation of the Act." *In re Permanent Surface Mining Regulation Litigation*, 653 F.2d 514, 516 (D.C.Cir.1981).

Under an approved state program, such as that in West Virginia, the state regulatory authority decides whether mining companies' permit applications meet the State[13] and federal SMCRA requirements. The state agency is the issuer of surface mining permits. *See* 30 U.S.C. § 1260. In West Virginia, the state regulatory agency is the DEP. Mining operations must also obtain permits under the CWA (Pub.L.92-500) (1972) (codified at 33 U.S.C. §§ 1251 et seq.). Under current regulatory practice, required CWA permits include a Section 401 permit certifying any proposed discharge will comply with applicable water

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[13]The state surfacing mining law is the West Virginia Surface Coal Mining and Reclamation Act ("SCMRA"), W.Va. Code §§ 22-3-1, et seq. (1998 & Supp. 1990).

quality standards, 33 U.S.C. § 1341; a Section 402 permit allowing discharge of pollutants from a point source into waters of the United States, 33 U.S.C. § 1342; and a Section 404 permit allowing discharge of dredge and fill material into waters of the United States, 33 U.S.C. § 1344.

OSM promulgated the buffer zone rule in 1979 to implement SMCRA Sections 515(b)(10) and (24) (codified at 30 U.S.C. § 1265(b)(18) and (24)).[14] SMCRA provides:

> General performance standards shall be applicable to all surface coal mining and reclamation operations and shall require the operation as *a minimum to* --
>
> ...
>
> (18) refrain from the construction of roads or other access ways up a stream bed or drainage channel or in such proximity to such channels so as to seriously alter the normal flow of water;
>
> ...
>
> (24) *to the extent possible using the best technology currently available, minimize disturbances and adverse impacts of the operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable.*

30 U.S.C. §§ 1265(b)(18) & (24) (emphasis added).

To carry out this statutory program, the *federal* buffer zone rule provides:

> (a) No land within 100 feet of a perennial stream or an

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[14]"Authority for this Section is Sections 102, 201, 501, 504, 506, 507, 508, 510, 414, and 517 of the Act. In particular, this Section is promulgated to implement Sections 515(b)(10 and 515(b)(24) of the Act." 44 Fed. Reg. 15176 (March 13, 1979) (promulgating buffer zone rule).

intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through such a stream. The regulatory authority may authorize such activities only upon finding that--

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream.[15]

30 C.F.R. § 816.57.

The *state* buffer zone regulation is similar, but requires additional specific findings to be made by the Director before buffer zone incursions may be authorized:

No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining

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[15]Under federal SMCRA regulations:

Intermittent stream means--(a) a stream or reach of a stream that drains a watershed of at least one square mile, or (b) A stream or reach of a stream that is below the local water table for at least some part of the year, and obtains its flow from both surface runoff and ground water discharge.

Perennial stream means a stream or part of a stream that flows continuously during all of the calendar year as a result of ground-water discharge or surface runoff.

30 C.F.R. § 701.5.

State regulations are almost identical, except identify a "part" of a perennial stream as a "portion" thereof. 38 C.S.R. § 2-2.88. For our purposes, the terms are synonymous.

Under the state CWA regulations, "intermittent streams have no flow during sustained periods of no precipitation and [ ] do not support aquatic life whose life history requires residence in flowing waters for a continuous period of at least six (6) months." 46 C.S.R. § 1-2.10. "Perennial streams" are not there defined.

operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards.[16] The area not to be disturbed shall be designated a buffer zone and marked accordingly.

38 C.S.R. § 2-5.2.

When OSM promulgated the buffer zone rule to implement SMCRA in 1979, it emphasized *protection* of streams, stream channels, and stream ecology: "Buffer zones are required to protect streams from ... gross disturbance of stream channels." 44 Fed.Reg. 15176. The buffer zone rule "recognizes that small streams may have a biologic community of considerable complexity worthy of protection under section 515(b)(24) of the Act, even if the streams are not perennial." *Id.* The rule "protects stream channels, but contemplates that the regulatory authority may allow surface mining activities to be conducted

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[16]In requiring specific findings, the state rule follows an earlier version of the federal rule. When the rule was amended to its present form, the agency reported:

> The "final paragraph ... does not include the specific references to the 'normal flow or gradient of the stream,' to 'fish migration,' and to 'material damage'.... The removal of these terms does not affect the [environmental impact statement] analysis as it applies to these final rules because they are all subsumed in the final proscription against causing or contributing to the violation of applicable State or Federal water quality standards and against adversely affecting the water quantity and quality or other environmental resources of the stream."

48 Fed.Reg. 30312 (June 30, 1983).

within 100 feet of a perennial stream [or intermittent stream] if operations ... can be conducted in an environmentally acceptable manner." *Id.* "Because of the significance of streams as features on the mine landscape, the [OSM] believes that rules on how streams are to be treated and protected should be spelled out. [The buffer zone rule] establishes the kinds of streams that have the level of biological significance that triggers direct protective measures." *Id.* at 15177. In 1983 when it modified the rule slightly, OSM reiterated these concerns: "Because of the significance of streams, OSM will specify how streams are to be treated and protected." 48 Fed.Reg. 30312 (June 30, 1983).

1. The Buffer Zone Rule Applies to All Portions of a Stream

Defendants do not disagree that streams should be protected, but explain this language refers to the entire stream system. Plaintiffs, Defendants allege, are "myopic" to think that OSM is speaking of particular stream segments. (Defs.' Mem. at 5.) Defendants read the OSM's stream protections to apply to a stream's entirety, so that one part of a stream, usually the headwaters and upper reaches, may be filled, *i.e.*, covered by a valley fill, as long as stream quantity and quality are not adversely affected downstream. This interpretation, however, leads to the reductio ad absurdum that miles of streams could be filled and deeply covered with rock and dirt, but if some stretch of water downstream of the fill remains undiminished and unsullied, the stream has been protected. The regulations provide otherwise. Under State regulations, an intermittent stream is "a stream or reach of a stream," that is, a portion of a stream. Perennial streams are "a stream or portion" thereof. State regulations clearly contemplate protecting stream portions.

Federal regulations also refer to a perennial stream or part of

a stream and an intermittent stream or reach thereof. *See* 30 C.F.R. § 701.5. Where such streams or their parts exist, they are to be protected by application of the buffer zone rule. *See* 30 C.F.R. § 816.57. As the United States Department of the Interior reported in the Final Environmental Statement implementing section 501(b) of SMCRA,[17] "The program should *directly protect* the quantity and quality of the *waters within and downstream of areas mined* and habitat characteristics, *including streambeds* and velocities, on which aquatic species are dependent." (*Permanent Regulatory Program Implementing Section 501(b) of [SMCRA]*, OSM-EIS-1, Jan. 1979, AIII-7, Pls.' Mem., Ex. 6 (emphasis added).) Nothing in the statute, the federal or state buffer zone regulations, or the agency language promulgating the federal regulations suggests that portions of existing streams may be destroyed so long as (some other portion of) the stream is saved. The Court finds and concludes the buffer zone rule protects entire intermittent and perennial streams, not just portions thereof.

Defendants make two responses to this analysis. First, they argue that interpreting the buffer zone rule to prohibit valley fills in streams is inconsistent with other portions of SMCRA, which Defendants believe presuppose valley fills will be placed in streams. Second, Defendants propose § 404 of the CWA specifically permits "fills" in the waters of the United States and therefore authorizes valley fills for disposing of excess spoil, as provided in the August 9, 1999 MOU.

2. Harmonizing the Buffer Zone Rule with SMCRA

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[17]Title V-Control of the Environmental Impacts of Surface Coal Mining, Pub.L. 95-87, § 501 (1977) (Environmental Protection Standards).

Defendants argue that even if buffer zone protection refers to entire streams, courts must read statutory provisions so that, when possible, no part of a statute is superfluous. *See, e.g., United States v. Childress*, 104 F.3d 47 (4th Cir.1996). Defendants point to other surface mining regulations which they believe implicitly acknowledge that valley fills may be placed in streams. Therefore, they argue, to "harmonize" the regulations, the buffer zone rule must be interpreted to allow valley fills.

First, Defendants identify a state regulation concerning "natural drainways," which provides:

> Natural drainways in the permit area shall be kept free of overburden except where overburden placement has been approved. Overburden placement and haulageways constructed across natural drainways shall not materially increase the sediment load, or materially affect stream quality.

38 C.S.R. § 2-5.2. "Natural drainway" is a defined term, meaning "any natural water course which may carry water to the tributaries and rivers of the watershed." 38 C.S.R. § 2-77. The state regulation allows overburden placement in natural drainways, where approved. Intermittent and perennial streams are natural drainways, Defendants argue,[18] and thus overburden

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[18]In depositions, a number of hydrogeologists were asked whether streams were natural drainways. Naturally, they said "yes." (*See, e.g.*, Charles H. Norris, Plaintiffs' hydrogeologist, explaining that intermittent and perennial streams occupy natural drainways, Defs.' Mem., Ex. 5 at 87-88.) However, "natural drainway" is not a technical term within hydrogeology, which these experts might explicate. The experts are simply speaking English. In common parlance, streams are natural drainways. In everyday speech, creeks, branches, rivulets, runs, brooks, and even rivers are all natural drainways. However, "natural drainway" is a defined term

may be placed in intermittent or perennial streams.

This logical progression, however, ignores the definitional language: "natural drainways ... *may* carry water *to the tributaries* and rivers of the watershed." A "tributary" is "one that is tributary to another as [ ] a stream feeding a larger stream or a lake."[19] The "tributaries and rivers of the watershed" are, therefore, by definition, its streams and rivers. Natural drainways may carry water to the tributaries and rivers of the watershed. Because they carry water to the tributaries, natural drainways are not the tributary streams themselves. Rather, the natural drainways are above the tributaries and may carry water to them.

The structure of the regulations supports this analysis, providing different rules for natural drainways, § 5.1, than for intermittent and perennial streams, § 5.2. Overburden placement may be approved in natural drainways, if it does not materially increase the sediment load or materially affect stream quality, but no overburden shall be placed in intermittent or perennial streams unless the Director makes the required buffer zone findings. *See* 38 C.S.R. §§ 2-5.1, 5.2. The Court, thus, finds and concludes that overburden placement in natural drainways is not inconsistent with the buffer zone rule.[20]

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with legal implications within the regulations and its explicit definition must be respected.

[19]Webster's Third New International Dictionary (1981).

[20] "Ephemeral stream means a stream which flows only in direct response to precipitation in the immediate watershed or in response to the melting of a cover of snow and ice, and which has a channel bottom that is always above the local water table." 30 C.F.R. § 701.5.

Ephemeral streams may carry water to intermittent and perennial streams and so may satisfy the definition of "natural drainways." The Court is not prepared to impose this interpretation, but simply notes that ephemeral streams appear to satisfy the syntax and logic of the definition.

Second, Defendants identify a federal regulation which, they argue, depends on the assumption that fills will be built in areas with intermittent or perennial water flow:

> A rock-core chimney drain may be used in a head-of-hollow fill,[21] instead of the underdrain and surface diversion system normally required, *as long as the fill is not located in an area containing intermittent or perennial streams.*

30 C.F.R. § 816.72(b) (emphasis added). Defendants propose "[t]his prohibition on rock-core drains *in 'intermittent or perennial streams,'* would be superfluous if the buffer zone rule already prohibited such fills." (Defs.Mem. at 11 (emphasis added).) More careful reading, however, reveals that the regulatory prohibition is on rock-core drains "located in *an area containing* intermittent or perennial streams." Such an area, of course, would include the buffer zone. In such an area, apparently, special care is required because, according to the regulation, a rock-core chimney drain is not sufficiently protective in areas where intermittent or perennial streams are located. The Court finds and concludes this regulation is not inconsistent with the buffer zone rule and in no way authorizes that valley fills may be located "in intermittent or perennial streams."

The Court further finds and concludes the SMCRA regulations may be harmonized without reading out or discounting the buffer zone rule. The rule states: No land within one hundred feet of an intermittent or perennial stream (including portions or parts thereof) shall be disturbed by surface mining operations including roads unless specifically

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[21]Fills that are constructed at the beginning or upper reaches of a valley are called "head-of-hollow" fills. *See* 30 C.F.R. § 701.5.

authorized by the Director. Valley fill waste disposal is a surface mining operation from which streams are protected. No other SMCRA regulations implicitly or explicitly contemplate such stream fill. Accordingly, the buffer zone rule, which protects entire intermittent and perennial streams from incursions within the one hundred foot buffer zone, is harmonious with other state and federal SMCRA regulations and must be accorded full force and effect.

C. The August 1999 Memorandum of Understanding and CWA § 404

In August, 1999 during the briefing period set for these summary judgment motions, a MOU was entered into by OSM EPA, the Corps, and DEP, which purports to provide a "clarification" of stream buffer zone regulations under SMCRA. After a brief introduction, the MOU begins:

> Section 404 of the Clean Water Act (CWA) authorizes the U.S. Army Corps of Engineers (Corps) to permit the discharge of dredged or fill material into waters of the U.S., including wetlands. *Discharges of excess spoil fill in waters of the U.S. from surface coal mining operations* resulting in only minimal adverse environmental impacts *are eligible for authorization under a CWA Section 404* General Permit; discharges causing more than minimal adverse environmental impacts are subject to CWA Section 404 Individual Permit Review.

(Defs.' Resp., Ex. 1 at 2 (emphasis added).) No authority is provided for the general proposition underlined above. On that basis, the MOU goes on to state that water quality findings

required under CWA Section 404, the 404(b)(1) Guidelines,[22] are "comparable" to the findings required for buffer zone variances under SMCRA. The MOU seeks "to enhance effective coordination and timeliness in the evaluation of proposals to discharge excess spoil fills in waters of the United States." (*Id.* at 3.) To that end,

> OSM and WVDEP believe that, where a proposed fill is consistent with the requirements of the Section 404(b)(1) Guidelines and applicable requirements for Section 401 certification of compliance with water quality standards, the fill would also satisfy the criteria for granting a stream buffer zone variance under SMCRA and WVDEP regulations.

(*Id.*) That is, the agencies signatory to the MOU propose to interpret the buffer zone regulation by substituting CWA 404(b)(1) Guidelines applicable to dredge and fill operations (and CWA Section 401 water quality certification, a Section 404 prerequisite) for buffer zone findings in buffer zone variance requests.

The buffer zone rule is a SMCRA rule. Under SMCRA, a savings clause provides that nothing therein "shall be construed as superseding, amending, modifying, or repealing the.... Clean Water Act, the State laws enacted pursuant thereto, or other Federal laws relating to preservation of water quality." 30 U.S.C. § 1292(a)(3). If CWA § 404 permits valley fills, Defendants argue, a SMCRA rule cannot prohibit them. Otherwise, the buffer zone rule would create an impermissible conflict between SMCRA and the CWA, a conflict in which CWA regulations, pursuant to the SMCRA savings clause, must

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[22]The 404(b)(1) Guidelines are codified at 33 U.S.C. § 1344(b)(1). *See also* 40 C.F.R. pt. 230 (1998).

prevail.

Defendants propose the MOU substitution of 404(b)(1) Guidelines for buffer zone findings moots Count 2 because the Director will no longer be required to make the buffer zone findings and under Count 3, applying 404(b)(1) standards, the Director may authorize valley fills.

1. Administrative Rulemaking

Plaintiffs argue the MOU initiates a profound change in the state surface mining regulatory program, essentially overriding buffer zone protections, but failing to follow SMCRA's mandatory procedures for program amendment: publication in the Federal Register, notice, public comment, evaluation by application of established criteria, and publication of the OSM Director's final decision in the Federal Register. *See* 30 C.F.R. §§ 732.17(g), (h)(1), (h)(2), (h)(11) & (h)(12). In opposition, Defendants urge the Court to treat the MOU as an interpretive rule.

An agency rule is considered "interpretive" rather than "substantive" when 1) it is not promulgated pursuant to the legislative power delegated to the agency by Congress to make rules having the force of law, or 2) the agency intends it to be "no more than an expression of its [own] construction of a statute or rule." *Reilly*, 728 F.Supp. at 1292 (quoting *Chamber of Commerce of the United States v. OSHA*, 636 F.2d 464, 468 (D.C.Cir.1980)). While an agency's own characterization is indicative of whether it intended the rule to be "interpretive" or "substantive," it is not dispositive. *Id.* Rather, the substance of the agency's action is decisive. *Id.* Interpretive rules merely "remind[ ] affected parties of existing duties." *Id.* (citations omitted).

The MOU itself disavows any substantive effect:

> The policy and procedures contained in this MOU are intended solely as guidance and do not create any rights, either substantive or procedural, enforceable by any party. *This document does not, and is not intended to, impose any legally binding requirements on Federal agencies, States, or the regulated public*, and does not restrict the authority of the employees of the signatory agencies to exercise their discretion in each case to make regulatory decisions based on their judgment about the specific facts and application of relevant statutes and regulations.

(MOU at 4 (emphasis added).) Defendants further argue that the MOU does not work a substantive change in the law because, first, CWA § 404(b)(1) Guidelines provide the same or greater protection than the buffer zone regulation. Second, because nothing in SMCRA may be construed as superseding, amending, modifying, or repealing the CWA, 30 U.S.C. § 1292(a)(3), if valley fills are permitted under the CWA, then the SMCRA buffer zone rule cannot preclude them. Defendants thus characterize the MOU as a non-substantive agency interpretation, entitled to the Court's deference.

While appreciating the Plaintiffs' concerns about the provenance and context of this interpretation proffered by Defendants,[23] the Court believes it cannot refuse to consider the MOU. It is put forward by the appropriate agencies[24] as an

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[23] *See supra* note 8.

[24] The Secretary of the Interior is authorized to administer the requirements of SMCRA. *See* 30 C.F.R. § 700.3. The Director of OSM Reclamation and Enforcement, under the general direction of the Assistant Secretary, Energy and Minerals, is responsible for exercising the authority of the Secretary. *Id.* § 700.4(a).

The 404(b)(1) guidelines have been developed by the Administrator of the EPA in conjunction with the Secretary of the Army acting through the

interpretive rule which purports to settle all litigation on these two counts and require judgment in favor of Defendants. In the agencies' view, the rule merely reminds affected parties of existing duties because it codifies current practice. According to Defendants, the longstanding practice under CWA § 404 is to permit fills when required 404(b)(1) Guideline findings are made. The MOU proposal simply applies this CWA authority to valley fills. Accordingly, the Court analyzes the MOU as an interpretive rule.

It is well established that when faced with a problem of statutory construction, "great deference [must be shown] to the interpretation given the statute by the officers or agency charged with its administration." *Drummond Coal Co. v. Hodel*, 610 F.Supp. 1489, 1495-96 (D.D.C.1985) (quoting *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965)). Deference is even more important when the interpretation of an administrative regulation is involved. *Id.* at 1496. When interpreting regulations, "the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Id.* (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)). "'Absent a contrary indication in the statute,' the [appropriate agency's] judgment must be accepted." *In re Permanent Surface Mining Regulation*, 653 F.2d at 522.

2. CWA § 404 Dredge and Fill Permits

Chief of Engineers. *See* 40 C.F.R. § 230.2(a).

The DEP Director issues the state surface mining permits.

Therefore, OSM, EPA, the Corps, and DEP, who have signed the MOU, are the appropriate agencies to interpret the 404(b)(1) guidelines and the buffer zone rule.

a. Corps' § 404 permit authority

Section 404 of the CWA governs the issuance of permits for discharges of dredged or fill material into waters of the United States.[25] The Corps was given authority over § 404 dredge and fill permits in recognition of the Corps' historical role under Section 10 of the Rivers and Harbors Act of 1899 as the permitting agency for dredge and fill activities in the nation's navigable waters. *See* 33 U.S.C. § 403; 42 Fed.Reg. 37,122 (1977).

Section 404 permits, issued by the Corps, authorize dredge and fill operations in waters of the United States. "Dredged material" is "material that is excavated or dredged from waters of the United States." 33 C.F.R. § 323.2(c). It is undisputed the overburden originating from mountaintop mining is not excavated or dredged from the waters of the United States. The Corps defines "fill material," for which Section 404 permits also may be issued, as:

> any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of an [sic] waterbody. *The term does not include any pollutant discharged into the water primarily to dispose of waste, as that activity is regulated under section 402 of the Clean Water Act.*[26]

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[25]Codified at 33 U.S.C. § 1344. Under the CWA, the phrase "waters of the United States" has been consistently interpreted broadly to include not only navigable waters and interstate waters, but all waters tributary to them. *See* 33 C.F.R. § 328.3(a) (1998). It is undisputed that intermittent and perennial streams are waters of the United States.

[26]Discharges governed by Section 402 of the CWA, 33 U.S.C. § 1342, are under the regulatory auspices of the EPA, not the Corps.

33 C.F.R. § 323.2(e) (emphasis added). This "primary purpose" definition explicitly excludes "pollutants"[27] discharged into the water primarily to dispose of waste.

Under Section 404, the Corps regulates the "discharge of fill material," which:

> includes, without limitation, the following activities: Placement of fill that is necessary for the construction of any structure in a water of the United States; the building of any structure or impoundment requiring rock, sand, dirt, or other material for its construction; site-development fills for recreational, industrial, commercial, residential, and other uses;[28] causeways or road fills; dams and dikes; artificial islands, property protection and/or reclamation devices such as riprap, groins, seawalls, breakwaters, and revetments; beach nourishment; levees; fill for structures such as sewage treatment facilities, intake and outfall pipes associated with power plants and subaqueous utility lines; and artificial reefs.

33 C.F.R. § 323.2(f). These uses are all constructive and do not

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[27]"Pollutants" are defined as "dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, ... heat, wrecked or discarded equipment, *rock, sand*, cellar dirt and *industrial*, municipal, and agricultural *wastes* discharged into water." 40 C.F.R. § 122.2 (emphasis added).

[28]The Court notes this portion of the definition might support Section 404 permits for valley fills with the primary purpose of land development in conjunction with properly permitted waivers of AOC. Defendants argue fills are necessary for dams, roads, and other development projects. The Court agrees. Site development fills for recreational, industrial, commercial, residential, and other uses are appropriately permitted under Section 404. In comparison, however, as discussed *infra*, valley fills constructed for the primary purpose of excess spoil disposal are not so authorized.

include any sort of waste disposal.

While valley fills in intermittent or perennial streams have the incidental effect of replacing an aquatic area with dry land and changing the bottom elevation of streams, their primary purpose is the disposal of rock and dirt, that is, industrial waste, the overburden or excess spoil which must be removed to mine the coal in mountaintop removal mining. *See Friends of Santa Fe County v. LAC Minerals, Inc.*, 892 F.Supp. 1333, 1342 (D.N.M.1995) (determining gold mine overburden not fill material subject to section 404); *Reilly*, 728 F. Supp. at 1286-87 (finding Corps' definition of "fill material" does not include disposal of waste or spoil in valley fills).

As Judge Copenhaver previously analyzed and stated the law of this district:

> [B]ecause the [Corps'] definition of fill material includes only material placed for the "primary purpose" of "changing the bottom elevation of a waterbody," it would appear that the [Corps] never intended to regulate the disposal of waste or spoil in valley fills. The primary purpose of the fills ... is to dispose of waste ..., not to create dry land such as is needed for construction of buildings or land development, as contemplated by the [Corps'] definition above.

Reilly, 728 F. Supp. at 1286-87.

Our Court of Appeals, affirming *Reilly* in an unpublished opinion, similarly stated, "The discharge of fill material at issue here is expressly for the purpose of disposing of waste or spoil from the mining operations." *West Virginia Coal Assoc. v. Reilly*, 932 F.2d 964, 1991 WL 75217 at *4 (4th Cir.1991).

The Court finds and concludes that overburden or excess spoil, being a pollutant and waste material, is not "fill material" subject to Corps' authority under Section 404 of the CWA when it is discharged into waters of the United States for the

primary purpose of waste disposal. The Corps' § 404 authority to permit fills in the waters of the United States does not include authority to permit valley fills for coal mining waste disposal. Fills with the primary purpose of waste disposal are regulated by the EPA under CWA § 402.[29] Accordingly, the

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[29]Under the Settlement Agreement, while Plaintiffs retained their right to challenge any future action by the Corps authorizing valley fills in waters of the United States under CWA Section 404, they surrendered their right to challenge such authorization with the argument that mining spoil is waste, and not fill material, under 33 C.F.R. § 323.2(e).

Additionally, under the Settlement Agreement, Counts 1 and 12 were dismissed with prejudice. Count 1 alleged the DEP Director failed to require Section 402 permits for valley fills, allowing them to be authorized under Section 404. Count 12 alleged the Corps was engaged in a pattern and practice of granting nationwide permits for valley fills under Section 404 of the CWA, rather than requiring permits under Section 402.

This Settlement Agreement among the parties, however, in no way prevents, nor could prevent, the Court from analyzing the MOU, as a proposed interpretive rule, in light of the controlling statutes, regulations and case law. Because Defendants propose employing CWA 404(b)(1) Guidelines in place of SMCRA buffer zone findings, the Court must inquire whether the MOU is consistent with SMCRA and with the CWA, or whether it is a clearly
erroneous interpretation of those statutes.

For the same reasons, Defendants' argument that this Court has no jurisdiction to enforce CWA standards in a SMCRA-based citizen suit fails. The Court here analyzes the August MOU, Defendants' proposed interpretive rule, to determine its consistency with CWA § 404 and associated Guidelines and regulations. Defendants cannot propose to alter SMCRA by introducing portions of the CWA, and then claim that because Plaintiffs did not have the foresight to bring suit under the law Defendants propose to substitute, the Court has no jurisdiction to interpret the substituted statute.

The Court is not enforcing the CWA against violation. The Court is interpreting the MOU for consistency with both the CWA and SMCRA, given Defendants' proposal to substitute CWA 404(b)(1) Guidelines for

August MOU is inconsistent with the CWA to the extent it bases its proposal on the Corps' authority to authorize waste fills in the waters of the United States.

b. EPA specifications for § 404 disposal sites: 404(b)(1) Guidelines

The Corps has primary responsibility for regulating the discharge of dredged and fill material into navigable waters under CWA Section 404. Congress additionally gave the EPA authority under Section 404 to promulgate guidelines for specification of disposal sites for dredged and fill material. See 33 U.S.C. § 1344(b)(1). These EPA Guidelines are the so-called "404(b)(1) Guidelines," 40 C.F.R. pt. 230, which the August MOU proposes to substitute for buffer zone findings. Within the site specification Guidelines, EPA defines "[f]ill material" as "any 'pollutant' which replaces portions of the 'waters of the United States' with dry land or which changes the bottom elevation of a water body for any purpose." 40 C.F.R. § 232.2. Because this EPA 404(b)(1) definition of "fill material" explicitly includes pollutants replacing dry land or changing the bottom elevation of a water body "for any purpose," Defendants propose these Guidelines are the appropriate Guidelines for CWA regulation of valley fills.

The Guidelines, however, only provide site specifications for the Corps to exercise its primary Section 404 authority. The EPA site specifications can neither enlarge nor exceed the Corps' Section 404 authority. The Corps' Section 404 authority does not extend to fills composed of pollutants "discharged into the water primarily to dispose of waste." 33 C.F.R. § 323.2(e).

SMCRA buffer zone findings. The Court's action is necessary and required in this SMCRA-based citizen suit.

Accordingly, the Court finds and concludes neither the Corps nor the EPA can authorize 404(b)(1) fills "for any purpose," where the primary purpose is waste disposal. Accordingly, the basis of the August MOU is inconsistent with the CWA.

The August MOU provides,

> Discharges of excess spoil fill into waters of the U.S. from surface coal mining operations ... are eligible for authorization under ... CWA Section 404 ... permit review. The Corps has the responsibility to review applications and to make decisions whether to authorize permits for Section 404 regulated discharges, including discharges of excess spoil material.

(MOU at 2.) Excess spoil valley fills are a waste disposal practice.

The Court finds and concludes the August MOU, as an interpretive rule, is inconsistent with the CWA. The MOU is a clearly erroneous interpretation of the CWA to the extent it proposes employing CWA Section 404 or its disposal site specification guidelines to authorize fills with the primary purpose of waste disposal. The Corps, in consultation with EPA, has regulatory authority under the CWA only where excess spoil is placed for constructive purposes as provided at 33 C.F.R. § 323.2(e).

Finally, the Court finds and concludes that because the CWA does not authorize valley fills for the primary purpose of waste disposal, there is no impermissible conflict between the CWA and the SMCRA buffer zone rule. The buffer zone rule thus is not overridden nor outranked by CWA Section 404. It remains in full force and effect.

3. Substitution of 404(b)(1) Guidelines for Buffer Zone Findings

Although the Corps lacks authority to authorize valley fills with the primary purpose of waste disposal under Section 404, the August MOU is not strictly dependent on that purported authority. As the MOU relates, the DEP (with OSM "assistance and/or oversight") issues surface mining permits, which certify the mining project is eligible for a buffer zone variance. Although the Court holds § 404 permits may not issue for fills with the primary purpose of waste disposal, that holding, without more, does not preclude the proposed substitution. The appropriate agencies[30] propose to interpret the SMCRA buffer zone rule using the Guidelines, which they characterize as "comparable," or the "functional equivalent" of the buffer zone findings. Thus, the Court must assess, also, whether the 404(b)(1) Guidelines are comparable to the current buffer zone rule, so as to be consistent with SMCRA and the CWA.

The purpose of the 404(b)(1) Guidelines is "to restore and maintain the chemical, physical, and biological integrity of waters of the United States through the control of discharges of dredged or fill material." 40 C.F.R. § 230.1. These Guidelines begin with what is elsewhere described[31] as a "presumption against discharge":

> Fundamental to these Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern.[32]

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[30]*See supra*, note 24.

[31]*See* 40 C.F.R. § 230.6(c).

[32]The terms "'aquatic environment' and 'aquatic ecosystem' mean waters

40 C.F.R. § 230.1(c).

Subpart B of the 404(b)(1) Guidelines provides further relevant restrictions on discharge of fill and dredged material:

> (b) No discharge of dredged or fill material shall be permitted if it:
> (1) Causes or contributes, after consideration of disposal site dilution and dispersion, to violations of any applicable State water quality standard.
> ...
> (c) Except as provided under section 404(b)(2),[33] no discharge of dredged or fill material shall be permitted which will cause or contribute to significant degradation of the waters of the United States.

40 C.F.R. § 230.10(b)(1). This 404(b)(1) standard of *significant degradation* of the waters of the United States is the standard the MOU proposes to substitute for buffer zone findings.

Findings of significant degradation under 404(b)(1) Guidelines require factual findings of:

> (1) *Significantly adverse effects of the discharge* of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, wildlife, and special aquatic sites.
> (2) *Significantly adverse effects of the discharge* of pollutants on life stages of aquatic life and other wildlife

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of the United States, including wetlands, that serve as habitat for interrelated and interacting communities and populations of plants and animals." 40 C.F.R. § 230.3.

[33]Where 404(b)(1) guidelines would prohibit the specification of a site, the additional consideration of the "economic impact of the site on navigation and anchorage" is required. 33 U.S.C. § 1344(b)(2).

dependent on aquatic ecosystems, including the transfer, concentration, and spread of pollutants or their byproducts outside of the disposal site ...

(3) *Significantly adverse effects of the discharge* of pollutants on aquatic ecosystem diversity, productivity, and stability. Such effects may include, but are not limited to, loss of fish and wildlife habitat or loss of the capacity of a wetland to assimilate nutrients, purify water, or reduce wave energy; or

(4) *Significantly adverse effects of discharge* of pollutants on recreational, aesthetic, and economic values.

40 C.F.R. § 230.10(c) (emphasis added).

The 404(b)(1) Guidelines' standard for disapproval of sites for Section 404 fill discharge is "significant degradation" of the waters of the United States. The standard for approval of buffer zone variances is "will not adversely affect," *inter alia*, related environmental values. In explaining why the Fish and Wildlife Service ("FWS") declined to sign the August MOU, David Densmore, FWS field office chief, succinctly compared the two standards:

> The two regulations differ in both the degree of degradation allowed (significant under section 404 and will not adversely affect under SMCRA regulations) and in the types of degradation considered. While Section 404 limits its analysis to aquatic impacts, SMCRA allows an evaluation of other environmental resources of the stream, in addition to water quantity and quality issues. According to the Federal Register announcement adopting SMCRA's regulations at 30 CFR 816.57, "the phrase 'and related environmental resources' has been added to the language of the final rule to indicate that regulatory authorities will be allowed to consider factors other than water quantity and quality in making buffer zone determinations."

(Pls.' Reply, Ex. 1.) Densmore concludes, "The 404 standard is, in effect, lower than the SMCRA standard, regardless of how the regulations have been applied on the ground." (*Id.*) Densmore's comparison is accurate. The 404(b)(1) standard, which allows degradation (adverse effect) of aquatic resources until the degradation becomes significant is a lower and less restrictive standard than the buffer zone standard, which allows no adverse effect on environmental resources.

Each of these two distinct standards with different levels of environmental protection is appropriate to the context in which it occurs. The CWA 404(b)(1) standard for constructive dredge and fill operations trades off some degradation of the aquatic ecosystem for economic, industrial, and recreational development. Where approved, development is allowed unless it significantly degrades water resources. In comparison, the SMCRA buffer zone rule protects entire streams through their intermittent reaches from surface mining activities, which are not allowed within one hundred feet of intermittent or perennial streams if environmental values will be *adversely affected*. The buffer zone rule is implemented to "minimize disturbances and adverse impacts of the [surface mining] operation on fish, wildlife, and related environmental values, and achieve enhancement of such resources where practicable." 30 U.S.C. § 1265(b)(18). The buffer zone standard, "not adversely affect," conforms to the statute.

Accordingly, the Court finds and concludes that the proposed substitution of 404(b)(1) Guideline standards for buffer zone findings is inconsistent with the buffer zone rule because it substitutes a more lenient, less protective standard than the SMCRA regulation now requires. To use 404(b)(1) Guidelines to permit valley fills in intermittent and perennial streams for the primary purpose of waste disposal is also inconsistent with CWA Section 404 under which Section 404(b)(1) is

authorized.[34] The Court therefore holds the August MOU must be rejected as inconsistent with, and an erroneous interpretation of, the statutes under which it is proposed. Accordingly, the Court holds the MOU is without force or effect on the extant buffer zone requirement. In sum, the buffer zone requirement means what it says, and it was not supplanted by the August 1999 MOU.

D. Summary Judgment on Counts 2 and 3

Summary judgment is appropriate where there is no genuine issue as to a material fact and movant is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The parties agree that no issues of material fact exist which would prevent the Court from reaching judgment as a matter of law on Counts 2 and 3.

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[34]The Court notes that a series of cases cited by Defendants for the proposition that waste fills may be permitted under 404(b)(1) do not, in fact, stand for that proposition. (See Defs.' Resp. at 13-14 (citing *New Hanover Township v. United States Army Corps of Engineers*, 796 F.Supp. 180 (E.D.Pa.1992), *vacated on other grounds*, 992 F.2d 470 (3rd Cir.1993); *Orange Environment, Inc. v. County of Orange*, 811 F.Supp. 926 (S.D.N.Y.1993); *Resource Inv., Inc. v. United States Army Corps of Eng'rs*, 151 F.3d 1162 (9th Cir.1998)).) These cases all involve municipal solid waste landfills in wetlands and, as the Ninth Circuit Court of Appeals held in *Resource Investments*,

> The Corps lacks authority under section 404 of the CWA to require a landowner to obtain a dredge and fill permit from the Corps before constructing a municipal solid waste landfill on a wetlands site. The construction of a municipal solid waste landfill on a wetlands site is regulated by the EPA and states with solid waste permit programs approved by the EPA under [the Resource Conservation and Recovery Act].

151 F.3d at 1169.

1. Count 2

Count 2 alleges the DEP Director is engaged in a pattern and practice of approving buffer zone variances on the basis of applications that do not include the required findings, when approving valley fills in intermittent and perennial streams.

State surface mining permits may not issue until DEP certifies "the permit application is accurate and complete and that all the requirements of this Act and the State or Federal program have been complied with." 30 U.S.C. § 1260(b); *see also* 38 C.S.R. § 2-3.32.d; 30 C.F.R. § 773.15. This is a non-discretionary duty.

The buffer zone regulation requires:

> The Director will authorize such operations only upon finding that surface mining activities will 1) not adversely affect the normal flow or 2) gradient of the stream, 3) adversely affect fish migration or 4) related environmental values, 5) materially damage the water quantity or 6) quality of the stream and 7) will not cause or contribute to violations of applicable State or Federal water quality standards.

38 C.S.R. § 2-5.2 (numerals added).

The Director and his agents consistently admit that he made none of the required findings, one through six.[35] The Director says either the agency's legal interpretation of the buffer zone

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[35]The Director claims finding number seven is made, implicitly, when a Section 401 approval is given prior to a Section 404 permit issuing. *See* water quality discussion *infra*, II.D.2.b.

rule[36] made application of buffer zone findings unnecessary for valley fills, or the Director applied CWA Section 404 requirements instead of buffer zone findings. The Director acknowledges all previous applications for buffer zone variances in mountain top removal operations have been reviewed in this manner.

Through this Memorandum Opinion and Order, the Court has determined the Director's legal rationales for failure to make the required buffer zone findings were inconsistent with the controlling statutes and regulations and relied on clearly erroneous interpretations of those laws. Accordingly, the Court GRANTS summary judgment for Plaintiffs on Count 2 of the Second Amended Complaint and holds the Director has a nondiscretionary duty to make the findings required under the buffer zone rule before authorizing any incursions, including valley fills, within one hundred feet of an intermittent or perennial stream.

2. Count 3

Count 3 alleges the DEP Director engaged in a pattern and practice of approving applications for surface mining permits that disturb buffer zones by allowing valley fills, an activity which cannot satisfy the criteria for a variance. Therefore, the Director violated his nondiscretionary duty to withhold approval of permit applications that were not complete and accurate and in compliance with all requirements of the state and federal programs.

a. Findings one through six

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[36] *See supra* note 8.

Plaintiffs' arguments that required buffer zone findings one through six cannot be made for valley fill waste disposal buffer zone incursions are simple and non-technical. The Director may approve such disturbance only upon finding surface mining activities will 1) not adversely affect the normal flow or 2) gradient of the stream, 3) adversely affect fish migration or 4) related environmental values, or 5) materially damage the water quantity or 6) quality of the stream. When valley fills are permitted in intermittent and perennial streams, they destroy those stream segments. The normal flow and gradient of the stream is now buried under millions of cubic yards of excess spoil waste material, an extremely adverse effect. If there are fish, they cannot migrate. If there is any life form that cannot acclimate to life deep in a rubble pile, it is eliminated. No effect on related environmental values is more adverse than obliteration. Under a valley fill, the water quantity of the stream becomes zero. Because there is no stream, there is no water quality. The Director lawfully cannot make required findings one through six for buffer zone variances for valley fills. In the stream portion filled, these requirements cannot provide a principled rationale for allowing valley fills.

b. Finding seven: State and federal water quality standards

Finding number seven requires the Director to find the valley fill will not cause or contribute to violations of applicable State or federal water quality standards.[37] Under federal regulations,

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[37]The Director argues the required findings have been made because a CWA § 404 permit cannot be issued until a § 401 permit is in place, assuring any applicable water quality standards have been met. Because § 404 permits may not authorize waste disposal operations such as valley fills, however, reliance on prerequisite findings for § 404 permit approval for water quality standards for valley fill waste disposal operations is misplaced.

States must specify water quality standards, which include appropriate water uses to be achieved and protected. *See* 40 C.F.R. § 130.6(c)(4)(i). "In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States." 40 C.F.R. § 131.10(a); *see also* 46 C.S.R. § 1-6.1(a). Defendants argue this regulation is irrelevant to valley fills because they "are not designed to be 'assimilated' or 'transported' by a stream; they are designed to stay in one place." (Defs.' Resp. at 11 n. 8.) This argument ignores the reality that valley fills are waste disposal projects so enormous that, rather than the stream assimilating the waste, the waste assimilates the stream. The Court holds that placement of valley fills in intermittent and perennial streams violates federal and state water quality standards by eliminating the buried stream segments for the primary purpose of waste assimilation.

Federal and state water quality standards also have an antidegradation component, which provides, "existing water uses and the level water quality necessary to protect the existing uses shall be maintained and protected." 40 C.F.R. 131.12(a)(1); 46 C.S.R. § 1-4.1(a). "[A]t a minimum all waters of the State are designated for the Propagation and maintenance of Fish and Other Aquatic Life ... and for Water Contact Recreation consistent with [CWA] goals."[38] 46 C.S.R. § 1-6.1. State and federal antidegradation policy require "the existing high quality waters of the State must be maintained at their

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[38]This standard is frequently referred to in shorthand fashion as "fishable/swimmable," but that is not entirely accurate. "An existing aquatic community composed entirely of invertebrates and plants, such as may be found in a pristine alpine tributary stream, should still be protected whether or not such a stream supports a fishery.... The term 'aquatic life' would more accurately reflect the protection that was intended in section 101(a)(2) of the [CWA]." EPA, *Water Quality Standards Handbook* § 4.4.

existing high quality."[39] If limited degradation is allowed,[40] "it shall not result in injury or interference with existing stream water uses or in violation of State or federal water quality criteria." 46 C.S.R. § 1-4.1.b.

Certain characteristics of industrial waste, indicative of degradation, are objectionable in all waters of the State under West Virginia water quality standards. Not allowed, for example, are "materials in concentrations which are harmful, hazardous or toxic to man, animal or aquatic life." 46 C.S.R. § 1-3.2.e. In stream segments filled with excess spoil,

> new mining techniques result in tremendous volumes of overburden waste material and a consequent increase in the size of valley filling, extending into intermittent and perennial stream reaches. Today the volume of a single stream fill can be as much as 250,000,000 cubic yards, with stream burials up to 2 miles long.

(Pls.' Mem., Ex. 5.)[41] This concentration of industrial waste is mortal to animal or aquatic life in the stream segment buried.

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[39]The testimony is uncontraverted that Pigeonroost Branch, proposed to be buried under a valley fill at the Hobet Spruce Fork mine, is a high quality state water. (*See, e.g.*, Politan Dep. at 188.)

[40]*See* 40 C.F.R. § 131.12(a)(2). The federal formulation provides clarity in stating that limited degradation is allowed only "[w]here the quality of the waters *exceed* levels necessary to support propagation of fish, shellfish, and wildlife and recreation in and on the water [.]" *Id.* (emphasis added).

[41]United States Fish & Wildlife Service, *Permitted Stream Losses Due to Valley Filling in Kentucky, Pennsylvania, Virginia, and West Virginia: A Partial Inventory* (1998). The FWS makes a "highly conservative" estimate that stream impacts by valley filling authorized by the state of West Virginia exceed 469.3 miles. *Id.* at 8. Significant valley filling activities in three West Virginia mining districts were not included in the study. *Id.*

Existing stream uses are not protected, but destroyed. These effects are inconsistent with State and federal water quality standards.

Federal and State water quality standards require the waters of the United States shall not be used for waste assimilation nor be degraded. The Director cannot make the required finding that valley fills will not cause or contribute to violations of applicable State or federal water quality standards. In the stream portion filled, those standards are inevitably violated. Accordingly, the Court GRANTS summary judgment for Plaintiffs on Count 3 and holds the Director has a nondiscretionary duty under the buffer zone rule to deny variances for valley fills in intermittent and perennial streams because they necessarily adversely affect stream flow, stream gradient, fish migration, related environmental values, water quality and quantity, and violate state and federal water quality standards.

The Court GRANTS Plaintiffs' motion for a permanent injunction enjoining the Director from further violations of the nondiscretionary duties discussed above and from approving any further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal.

III. OBSERVATION

Defendants have argued throughout the briefing on these summary judgment motions that application of the buffer zone rule, "if implemented by the Court ... would end not only mountaintop mining but virtually all types of mining by eliminating valley fills." (*See, e.g.*, Defs.' Mem. at 1.) Certainly, Defendants argue, legislators could not have intended to "secretly" abolish coal mining by adopting the buffer zone regulation. (*Id.* at 14.)

When OSM promulgated the buffer zone rule in 1979, it considered comments on the buffer zone, intermittent and perennial stream definitions, and coal production:

> Surface mining is impossible without destruction of a number of minor natural drainages, including some ephemeral streams as defined in section 701.5. The Office, therefore, believes it is permissible to surface mine coal so long as a reasonable level of environmental protection is afforded.
>
> [ ] Several other commenters felt only perennial streams should require buffer zones. This would reduce operator cost and increase coal production from deposits underlying nonperennial streams. The Office believes that this alternative is illegal; however, because there are significant fish and wildlife resources in streams other than perennial streams that need protection under section 515(b)(24) of [SMCRA].

44 Fed.Reg. 15177 (1979). Thus, coal production and surface mining were considered when the regulations were promulgated. The regulator OSM nevertheless concluded that destruction of streams below natural drainways was illegal.

The Court is called upon to interpret the law and the regulations. To the extent misapprehension of the buffer zone rule was fostered by the Director or other agencies, the public and the remaining parties have been done a disservice. However, if application of the buffer zone rule, a regulation under federal law, prevents surface area coal mining or substantially limits its application to mountaintop removal in the Appalachian coalfields, it is up to Congress and the Legislature, but not this Court to alter that result.

IV. CONCLUSION

To summarize, the Court GRANTS Plaintiffs' motion for summary judgment, GRANTS Plaintiffs' motion for a permanent injunction, and DENIES Defendants' motion for summary judgment.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record.

ENTER: October 20, 1999

/s/

Charles H. Haden II, Chief Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT WEST VIRGINIA
CHARLESTON DIVISION

Patricia BRAGG, *et al.*,
Plaintiffs,

v. Civil Action No. 2:98-0636
[Entered Nov. 1, 1999)

Colonel Dana ROBERTSON,
et al.,
Defendants.

MEMORANDUM OPINION AND ORDER GRANTING STAY

HADEN, Chief Judge.

Pending are motions by all Defendants to stay the permanent injunction portion of the Court's ruling pending resolution of Defendants' appeal.

By Memorandum Opinion and Order of October 20, 1999 the Court enjoined Defendant Director of the West Virginia Department of Environmental Protection from approving further buffer zone variances without making the required findings and from approving further surface mining permits under current law that would authorize placement of excess spoil in intermittent and perennial streams for the primary purpose of waste disposal.

Defendants' motions to stay and appeal notices were filed October 25 and 26, 1999 concurrent with a request to convert a previously scheduled hearing on other issues to a hearing on the motions to stay. Before acting, the Court allowed Plaintiffs

until October 28, 1999 to respond to the motions for stay. *See* Memorialization of Hr'g Events (Oct. 27, 1999) at 2. Uninvited and in disregard of the briefing order, Defendants supplemented their stay motion on October 28, 1999 with affidavits and a further memorandum of law. Accordingly, the Court granted Plaintiffs one further day to make additional response to Defendants' supplements, which Plaintiffs were unable to review prior to filing their initial timely response. Now all briefing has been considered and the issue is now ripe for decision.

There is no automatic stay pending appeal in actions for injunctions; in these actions a judgment, whether interlocutory or final, may be stayed only by order of the court. *See* Wright & Miller, 11 Federal Practice & Procedure § 2904 (1995). *Rule* 62(c) authorizes the trial court to suspend, modify, restore, or grant an injunction during the pendency of an appeal in injunction cases. Fed.R.Civ.P. 62(c). A notice of appeal does not divest the Court of jurisdiction to consider a stay application. Wright & Miller, *id.*; *One Stop Deli, Inc. v. Franco's Inc.*, No. Civ.A.93-090-H, 1994 WL 147763 at *1 (W.D.Va. Mar. 28, 1994). An application under Rule 62(c) necessarily goes to the discretion of the court. Wright & Miller, *id.*

The merits of the motion are governed by the four-part test set forth in *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir.1970), which requires the moving party to show 1) that it would likely prevail on the merits of the appeal; 2) that it will suffer irreparable injury if the stay is denied; 3) that the other parties will not be substantially harmed by the stay; and 4) that the public interest will be served by granting the stay.

Defendants' late offerings give the Court no basis upon which to conclude the Court of Appeals will reach a contrary result. Their assertions on the remaining factors present the Court with an insufficient basis upon which to determine whether they

have satisfied their heavy burden under Rule 62(c). In sum, the present record on the four factors militates in favor of denying a stay.

Nonetheless, as the Supreme Court noted in *Hilton v. Braunskill,* 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987), "the traditional stay factors contemplate individualized judgments in each case, [and] *the formula cannot be reduced to a set of rigid rules.*" *Id.* (emphasis added); *GTE Products Corp. v. Kennametal, Inc.*, 772 F.Supp. 907, 920 (W.D.Va.1991). Mindful of this practical admonition, and the Supreme Court's overarching concern for substance over form, the Court believes a stay best serves the interests of justice under these circumstances.

Since the Order including the permanent injunction of October 20, 1999 issued, a firestorm of reaction has come forth from Defendants and state government officials, predicting that the Court's injunction will cause unprecedented economic and social dislocation throughout West Virginia. These opinions are echoed in the affidavits filed by Defendants supplementing their motions to stay. The dire predictions are further bolstered by third party statements of what the Court's Opinion holds. As noted, those "opinions" not originating with the Court reflect, at best, misunderstandings and, at worst, egregious misrepresentations, of significant portions of the ruling. Additionally, many coal workers have been laid off or given WARN notices and the Governor has ordered State government to budget-cut to accommodate a ten percent decrease in expected tax revenues.

This Court is in no position to examine adequately the factual basis of these reactions so as to take an informed measure of the harms predicted and weigh them in the balance of equities required to adequately address the justice of issuing a stay at this time. The Court, however, is able to understand that the shrill atmosphere of discord must subside so that our Court of

Appeals and this Court are able to address the crucially important legal issues that formed the basis of the October 20 ruling and that shape the remainder of the case calling for district court action.

In short, the Court believes it preferable to attempt to defuse invective and diminish irrational fears so that reasoned decisions can be made with all deliberate speed, but with distractions minimized. Accordingly, and of its own volition and discretion, the Court GRANTS Defendants' motion to stay the permanent injunction pending appellate action.

The Clerk is directed to send a copy of this Memorandum Opinion and Order to counsel of record by FACSIMILE TRANSMISSION and first class mail and to post it on the Court's website at http://www.fedcourtwvsd.com.

ENTER: November 1, 1999

/s/

Charles H. Haden II, Chief Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 99-2443, 99-2445, 99-2446, 99-2447, 99-2448, 99-2683, 00-1338, 00-1339 (Consolidated)

PATRICIA BRAGG; JAMES W. WEEKLEY; SIBBY R. WEEKLEY; WEST VIRGINIA HIGHLANDS CONSERVANCY; CARLOS GORE; LINDA GORE; CHERYL PRICE; JERRY METHENA,
Plaintiffs-Appellees,

v.

WEST VIRGINIA COAL ASSOCIATION; WEST VIRGINIA MINING AND RECLAMATION ASSOCIATION, HOBET MINING, INCORPORATED; CATENARY COAL COMPANY; MINGO-LOGAN COAL COMPANY; WESTERN POCAHONTAS PROPERTIES LIMITED PARTNERSHIP; NATIONAL COUNCIL OF COAL LESSORS, INCORPORATED; INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA,
Intervenors/Defendants-Appellants,

and

DANA ROBERTSON, Colonel, District Engineer, U.S. Army Corps of Engineers, Huntington District; JOE N. BALLARD, Lieutenant General, Chief of Engineers and

Commander of the U.S. Army Corps of Engineers; MICHAEL D. GHEEN, Chief to the Regulatory Branch, Operations and Readiness Division, U.S. Army Corps of Engineers, Huntington District; MICHAEL C. CASTLE, Director, West Virginia Division of Environmental Protection,
Defendants-Appellants,

On Petition for Rehearing and Rehearing En Banc
[Entered July 13, 2001]

The federal appellants' petition for rehearing and rehearing en banc and the appellees' petition for rehearing en banc were submitted to this Court. As no member of this Court or the panel requested a poll on the petitions for rehearing en banc, and

As the panel considered the petition for rehearing of the federal appellants and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and the petitions for rehearing en banc are denied.

For the Court,

/s/ Patricia S. Connor

CLERK

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Eleventh Amendment

The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, *et seq.*

§ 1253. State Programs

(a) Regulation of surface coal mining and reclamation operations; submittal to Secretary; time limit; demonstration of effectiveness. Each state in which there are or may be conducted surface coal mining operations on non-Federal lands, and which wishes to assume exclusive jurisdiction over the regulation of surface coal mining and reclamation operations, except as provided in sections 521 and 523 and title IV of this Act, shall submit to the Secretary, by the end of the eighteenth-month period beginning on the date of enactment of this Act, a State program which demonstrates that such State has the capability of carrying out the provisions of this Act and meeting its purposes through -

(1) a State law which provides for the regulation of surface coal mining and reclamation operations in accordance with the requirements of this Act;

(2) a State law which provides sanctions for violations of State laws, regulations, or conditions of permits concerning surface coal mining and reclamation operations, which

sanctions shall meet the minimum requirements of this Act, including civil and criminal actions, forfeiture of bonds, suspensions, revocations, and withholding of permits, and the issuance of cease-and-desist orders by the State regulatory authority or its inspectors;

(3) a State regulatory authority with sufficient administrative and technical personnel, and sufficient funding to enable the State to regulate surface coal mining and reclamation operations in accordance with the requirements of this Act;

(4) a State law which provides for the effective implementations, maintenance, and enforcement of a permit system, meeting the requirements of this title for the regulations of surface coal mining and reclamation operations for coal on lands within the State;

(5) establishment of a process for the designation of areas as unsuitable for surface coal mining in accordance with section 522 provided that the designation of Federal lands unsuitable for mining shall be performed exclusively by the Secretary after consultation with the State; and

(6) establishment for the purposes of avoiding duplication, of a process for coordinating the review and issuance of permits for surface coal mining and reclamation operations with any other Federal or State permit process applicable to the proposed operations;

and (7) rules and regulations consistent with regulations issued by the Secretary pursuant to this Act.

* * *

§ 1254. Federal Programs

* * *

(b) Federal enforcement of State program. In the event that a State has a State program for surface coal mining, and is not enforcing any part of such program, the Secretary may provide for the Federal enforcement, under the provisions of section

521, of that part of the State program not being enforced by such State.

§ 1256. Permits.

(a) Persons engaged in surface coal mining within State; time limit; exception. No later than eight months from the date on which a State program is approved by the Secretary, pursuant to section 503 of this Act, or no later than eight months from the date on which the Secretary has promulgated a Federal program for a State not having a State program pursuant to section 504 of this Act, no person shall engage in or carry out on lands within a State any surface coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program or by the Secretary pursuant to a Federal program; except a person conducting surface coal mining operations under a permit from the State regulatory authority, issued in accordance with the provisions of section 502 of this Act, may conduct such operations beyond such period if an application for a permit has been filed in accordance with the provisions of this Act, but the initial administrative decision has not been rendered.

* * *

§ 1260. Permit approval or denial.

(a) Basis for decision; notification of applicant and local government officials; burden of proof. Upon the basis of a complete mining application and reclamation plan or a revision or renewal thereof, as required by this Act and pursuant to an approved State program or Federal program under the provisions of this Act, including public notification and an opportunity for a public hearing as required by section 513, the regulatory authority shall grant, require modification of, or deny the application for a permit in a reasonable time set by the regulatory authority and notify the applicant in writing. The

applicant for a permit, or revision of a permit, shall have the burden of establishing that his application is in compliance with all the requirements of the applicable State or Federal program. Within ten days after the granting of a permit, the regulatory authority shall notify the local governmental officials in the local political subdivision in which the area of land to be affected is located that a permit has been issued and shall describe the location of the land.

(b) Requirements for Approval. No permit or revision application shall be approved unless the application affirmatively demonstrates and the regulatory authority finds in writing on the basis of the information set forth in the application or from information otherwise available which will be documented in the approval, and made available to the applicant, that -

(1) the permit application is accurate and complete and that all the requirements of this Act and the State or Federal program have been complied with;

* * *

§ 1270. Citizen Suits.

(a) Civil action to compel compliance with 30 U.S.C. §§ 1201 et seq. Except as provided in subsection (b) of this section, any person having an interest which is or may be adversely affected may commence a civil action on his own behalf to compel compliance with this Act--

(1) against the United States or any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution which is alleged to be in violation of the provisions of this Act or of any rule, regulation, order or permit issued pursuant thereto, or against any other person who is alleged to be in violation of any rule, regulation, order or permit issued pursuant to this title; or

(2) against the Secretary or the appropriate State regulatory

authority to the extent permitted by the eleventh amendment to the Constitution where there is alleged a failure of the Secretary or the appropriate State regulatory authority to perform any act or duty under this Act which is not discretionary with the Secretary or with the appropriate State regulatory authority.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.

(b) Limitation on bringing of action. No action may be commenced -

(1) under subsection (a)(1)of this section -

(A) prior to sixty days after the plaintiff has given notice in writing of the violation (i) to the Secretary, (ii) to the State in which the violation occurs, and (iii) to any alleged violator; or

(B) if the Secretary or the State has commenced and is diligently prosecuting a civil action in a court of the United States or a State to require compliance with the provisions of this Act, or any rule, regulation, order, or permit issued pursuant to this Act, but in any such action in a court of the United States any person may intervene as a matter of right; or

(2) under subsection (a)(2) of this section prior to sixty days after the plaintiff has given notice in writing of such action to the Secretary, in such manner as the Secretary shall by regulation prescribe, or to the appropriate State regulatory authority, except that such action may be brought immediately after such notification in the case where the violation or order complained of constitutes an imminent threat to the health or safety of the plaintiff or would immediately affect a legal interest of the plaintiff.

(c)(1) Venue; intervention. Any action respecting a violation of this

Act or the regulations thereunder may be brought only in the

judicial district in which the surface coal mining operation complained of is located.

(2) In such action under this section, the Secretary, or the State regulatory authority, if not a party, may intervene as a matter of right.

(d) Costs; filing of bonds. The court, in issuing any final order in any action brought pursuant to subsection (a) of this section, may award costs of litigation (including attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

(e) Effect on other enforcement methods. Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any of the provisions of this Act and the regulations thereunder, or to seek any other relief (including relief against the Secretary or the appropriate State regulatory authority).

(f) Action for damages. Any person who is injured in his person or property through the violation by any operator of any rule, regulation, order, or permit issued pursuant to this Act may bring an action for damages (including reasonable attorney and expert witness fees) only in the judicial district in which the surface coal mining operation complained of is located. Nothing in this subsection shall affect the rights established by or limits imposed under State Workmen's Compensation laws.

§ 1271. Enforcement.

(a) Notice of violation; Federal inspection; waiver of notification period; cessation order; affirmative obligation on operator; suspension or revocation of permits; contents of notices and orders. (1) Whenever, on the basis of any

information available to him, including receipt of information from any person, the Secretary has reason to believe that any person is in violation of any requirement of this Act or any permit condition required by this Act, the Secretary shall notify the State regulatory authority, if one exists, in the State in which such violation exists. If no such State authority exists or the State regulatory authority fails within ten days after notification to take appropriate action to cause said violation to be corrected or to show good cause for such failure and transmit notification of its action to the Secretary, the Secretary shall immediately order Federal inspection of the surface coal mining operation at which the alleged violation is occurring unless the information available to the Secretary is a result of a previous Federal inspection of such surface coal mining operation. The ten-day notification period shall be waived when the person informing the Secretary provides adequate proof that an imminent danger of significant environmental harm exists and that the State has failed to take appropriate action. When the Federal inspection results from information provided to the Secretary by any person, the Secretary shall notify such person when the Federal inspection is proposed to be carried out and such person shall be allowed to accompany the inspector during the inspection.
(2) When, on the basis of any Federal inspection, the Secretary or his authorized representative determines that any condition or practices exist, or that any permittee is in violation of any requirement of this Act or any permit condition required by this Act, which condition, practice, or violation also creates an imminent danger to the health or safety of the public, or is causing, or can reasonably be expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or his authorized representative shall immediately order a cessation of surface coal mining and reclamation operations or the portion thereof relevant to the condition, practice, or violation. Such cessation order shall remain in

effect until the Secretary or his authorized representative determines that the condition, practice, or violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. Where the Secretary finds that the ordered cessation of surface coal mining and reclamation operations, or any portion thereof, will not completely abate the imminent danger to health or safety of the public or the significant imminent environmental harm to land, air, or water resources, the Secretary shall, in addition to the cessation order, impose affirmative obligations on the operator requiring him to take whatever steps the Secretary deems necessary to abate the imminent danger or the significant environmental harm.

(3) When, on the basis of a Federal inspection which is carried out during the enforcement of a Federal program or a Federal lands program, Federal inspection pursuant to section 502, or section 504(b) or during Federal enforcement of a State program in accordance with subsection (b) of this section, the Secretary or his authorized representative determines that any permittee is in violation of any requirement of this Act or any permit condition required by this Act; but such violation does not create an imminent danger to the health or safety of the public, or cannot be reasonably expected to cause significant, imminent environmental harm to land, air, or water resources, the Secretary or authorized representative shall issue a notice to the permittee or his agent fixing a reasonable time but not more than ninety days for the abatement of the violation and providing opportunity for public hearing. If, upon expiration of the period of time as originally fixed or subsequently extended, for good cause shown and upon the written finding of the Secretary or his authorized representative, the Secretary or his authorized representative finds that the violation has not been abated, he shall immediately order a cessation of surface coal

mining and reclamation operations or the portion thereof relevant to the violation. Such cessation order shall remain in effect until the Secretary or his authorized representative determines that the violation has been abated, or until modified, vacated, or terminated by the Secretary or his authorized representative pursuant to subparagraph (a)(5) of this section. In the order of cessation issued by the Secretary under this subsection, the Secretary shall determine the steps necessary to abate the violation in the most expeditious manner possible, and shall include the necessary measures in the order.

* * *

(b) Inadequate State enforcement; notice and hearing. Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this Act, the Secretary shall enforce, in the manner provided by this Act, any permit condition required under this Act, shall issue new or revised permits in accordance with requirements of this Act, and may issue such notices and orders as are necessary for compliance therewith: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the

permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this Act before suspending or revoking the State permit.

* * *

§ 1276. Judicial Review.

* * *

(e) Action of State regulatory authority. Action of the State regulatory authority pursuant to an approved State program shall be subject to judicial review by a court of competent jurisdiction in accordance with State law, but the availability of such review shall not be construed to limit the operation of the rights established in section 520 except as provided therein.

§ 1291. Definitions.

For the purposes of this Act–

* * *

(22) "regulatory authority" means the State regulatory authority where the State is administering this Act under an approved State program or the Secretary where the Secretary is administering this Act under a Federal program;

* * *

25) "State program" means a program established by a State pursuant to section 503 to regulate surface coal mining and reclamation operations, on lands within such State in accord with the requirements of this Act and regulations issued by the Secretary pursuant to this Act;

(26) "State regulatory authority" means the department or agency in each State which has primary responsibility at the State level for administering this Act;

* * *

Code of Federal Regulations
Title 30
Chapter VII–Office of Surface Mining Reclamation and Enforcement, Department of the Interior
Subchapter G—Surface Coal Mining and Reclamation Operations Permits and Coal Exploration Systems under Regulatory Programs
Part 732—Procedures and Criteria for Approval or Disapproval of State Program Submissions

§ 732.17. State program amendments.

* * *

(g) Whenever changes to laws or regulations that make up the State program are proposed by the State, the State shall immediately submit the proposed changes to the Director as an amendment. No such change to laws or regulations shall take effect for purposes of a State program until approved as an amendment.

* * *

Part 733—Maintenance of State Programs and Procedures For Substituting Federal Enforcement of State Programs and Withdrawing Approval of State Programs

§ 733.11 General requirements for maintaining State programs. States with an approved State program shall implement, administer, enforce and maintain it in accordance with the Act, this chapter and the provisions of the approved State program.

Subchapter K—Permanent Program Performance Standards
Part 816—Permanent Program Performance Standards—
Surface Mining Activities

§ 816.57. Hydrologic balance: Stream buffer zones.

(a) No land within 100 feet of a perennial stream or an intermittent stream shall be disturbed by surface mining activities, unless the regulatory authority specifically authorizes surface mining activities closer to, or through, such a stream. The regulatory authority may authorize such activities only upon finding that–

(1) Surface mining activities will not cause or contribute to the violation of applicable State or Federal water quality standards, and will not adversely affect the water quantity and quality or other environmental resources of the stream; and

(2) If there will be a temporary or permanent stream-channel diversion, it will comply with § 816.43.

(b) The area not to be disturbed shall be designated as a buffer zone, and the operator shall mark it as specified in § 816.11.

Subchapter L—Permanent Program Inspection And Enforcement Procedures
Part 843—Federal Enforcement

§ 843.12 Notices of violation.

* * *

(a)(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does

not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, subject to the procedures of §842.11(b)(1)(iii) of this chapter, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is required before the issuance of a notice of violation if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter.

Subchapter T—Programs for The Conduct of Surface Mining Operations Within Each State

Part 900—Introduction

§ 900.11. Organization of this subchapter.

Parts 901 through 950 are reserved for each State alphabetically. The program applicable within each State is codified in the part for that State. * * *

§ 900.12. State regulatory programs.

(a) Upon approval of a State regulatory program the Secretary will publish a final rule to be codified under the applicable part number assigned to the State. The full text will not appear below. Notification of the approval of the program and the dates on which any amendments were submitted will appear. Also included below are the addresses of OSM Headquarters, field and State Regulatory Authority offices where copies of the State programs are available for inspection and copying.

(b) Provisions of approved State regulatory programs or permits

issued pursuant to an approved State regulatory program may be enforced by the Secretary or his authorized agents pursuant to sections 504(b) and 521 of the Act and part 842 of this chapter.

Part 948—West Virginia

§ 948.1 Scope.

This part contains all rules applicable only within West Virginia that have been adopted under the Surface Mining Control and Reclamation Act of 1977.

§ 948.15. Approval of regulatory program amendments.

The following table lists the dates that West Virginia submitted proposed amendments to OSM, the dates when OSM published final rules approving all or portions of those amendments in the Federal Register, and the State statutory or regulatory citations for those amendments (or a brief description of the amendment). * * *

Original amendment submission date	Date of publication of final rule	Citation/description of approved provisions
		* * *
June 30, 1986, April 26, 1986 ...	May 23, 1990 ...	Code of Violations; Replacement of all regulations in chapter 20, Article 6, Series VII and VII-A (1985) with new set of Legislative Rules at title 38, Series 2.
		* * *
June 28, 1993 ...	October 4, 1995, February 21, 1996	WV Code 22-1-4 through -8; 22-2; 22-3-3, -5, -7, -8, -9, a, -11(a), (g), -12, -13, -15, -17, -18, -19, -22, -26, -28, -40; 22B-1-4 through -12; 22B-3-4; 22B-4; CSR 38-2-1.2, -2, -3.1(o), .4, .6, .7, .8, .12, .14, .15, .16, .25, .26, .27(a), .28, .29, .30,

.31(a), .32, .33, .34, -4, .1(a), .2 through .12, -5.2, .4, .5, -6, .3(b), .6, .8, -8.1, -9, -11.1 through .7, -12.2, .3, .4(a), (2)(B), (c) through (e) except the words "other responsible party" at (e) are not approved, .5, -13, -14.5, .8, .11, .12, .14, .15, .17, .18, .19, -15.2, -16.2, -17, -18.3, -20.1, .2, .4 through .7, -22; 38-2C-4, -5, -8.2, -10.1, -11.1; 38-2D-4.4(b), -6.3(a), -8.7(a). [boldface added]

* * *

West Virginia Code
Chapter 22. Environmental Resources
Article 3. Surface Coal Mining and Reclamation Act

§22-3-18. Approval, denial, revision and prohibition of permit.

(a) Upon the receipt of a complete surface-mining application or significant revision or renewal thereof, including public notification and an opportunity for a public hearing, the director shall grant, require revision of, or deny the application for a permit within sixty days and notify the applicant in writing of the decision. The applicant for a permit, or revision of a permit, has the burden of establishing that the application is in compliance with all the requirements of this article and the rules promulgated hereunder.

(b) No permit or significant revision of a permit may be approved unless the applicant affirmatively demonstrates and the director finds in writing on the basis of the information set forth in the application or from information otherwise available which shall be documented in the approval and made available to the applicant that:

(1) The permit application is accurate and complete and that all the requirements of this article and rules thereunder have been complied with; * * *.

Division of Environmental Protection
Title 38–Series 2
West Virginia Surface Mining Reclamation Regulations

38 C.S.R. 2-5.2. Intermittent or Perennial Stream.

5.2.a. Intermittent or Perennial Stream. No land within one hundred feet (100') of an intermittent or perennial stream shall be disturbed by surface mining operations including roads unless specifically authorized by the Director. The Director will authorize such operations only upon finding that the surface mining activities will not adversely affect the normal flow or gradient of the stream, adversely affect fish migration or related environmental values, materially damage the water quantity or quality of the stream and will not cause or contribute to violations of applicable State or Federal water quality standards. The area not to be disturbed shall be designated a buffer zone and marked accordingly.